WHEN LAW MOVES QUICKER THAN CULTURE: KEY JURISPRUDENTIAL REGULATIONS SHAPING THE US ADULT CONTENT PRODUCTION INDUSTRY

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ABSTRACT

I use historical sociology to explore the research question—*Why, in spite of its legal and protected status, is adult content and adult content production still a stigmatizing and polarizing dimension of U.S. culture?* A historically grounded sociological consideration of relevant jurisprudential proceedings occurring during three eras of US adult content production and distribution points to legal findings out-pacing socio-cultural evolutions. Developing technology has contributed to this process as well.

I. INTRODUCTION

The U.S. adult entertainment industry, just one dimension of a wider global "porn business," is massive and diverse. The industry provides consumers with a variety of goods and services, including but not limited to adult-oriented websites, cable, satellite, and pay-per-view entities that provide adult content, as well as adult novelty production and sales.[1] According to the industry's foremost trade publication *Adult Video News* (AVN), the U.S. adult entertainment industry generated 12.9 billion dollars worth of revenue in 2006.[2]

Adult content production, or what is conventionally known as pornography, is a significant and prolific component of the adult entertainment industry. Though adult content production has changed dramatically in past decades and though no rigorous estimates of web-based content revenue exists,[3] the rental and sales of "adult films" reportedly account for 3.6 billion of the total 12.9 billion dollars worth of annual returns generated by the industry overall.[4] Further, in spite of competition from web-based media forms, tangible product (DVD) sales and rentals continue to be viable markets.[5] For example, in 2006, DVD sales and rentals ac-

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1. Frank Rich, *Naked Capitalists*, N.Y. TIMES, May 20, 2001, www.nytimes.com/2001/05/20/magazine/naked-capitalists.html?pagewanted=all&src=pm. *See also* CARMINE SARRACINO & KEVIN M. SCOTT, THE PORNING OF AMERICA: THE RISE OF PORN CULTURE, WHAT IT MEANS, AND WHERE WE GO FROM HERE xv–xvi (2008) (noting the wide array of materials to which the term "porn" applies).

2. MJ McMahon, *Cable, Internet, Novelty Revenues See Double-Digit Growth Rates in 2006, Video Declines*, ADULT VIDEO NEWS (Jan. 10, 2007), http://business.avn.com/articles/video/Cable-Internet-Novelty-Revenues-See-Double-Digit-Growth-Rates-in-2006-Video-Declines-29518.html. All estimates of all aspects of adult entertainment industry revenue are, at best, estimates. Rigorous or otherwise, no comprehensive assessment of the adult industry's revenue or worth has ever been conducted. Consequently, all values assigned to adult industry returns need to be taken critically.

3. *Id.*

4. *Id.*

5. *Id.* ("[V]ideo sales and rentals still made up the largest slice of the adult industry pie . . . .").

counted for twenty-eight percent of all adult entertainment industry revenue generated.[6]

In spite of economic downturns, adult content is clearly in consumer demand.[7] It is also legal to produce and is protected by the First Amendment.[8] These factors would lead one to believe that adult content and the adult content production industry are at least somewhat acceptable to wider society; however, the industry and its products continue to be stigmatizing, polarizing dimensions of U.S. culture. They are even occasionally described as "obscenity."[9] In this article, historical sociology is used to analyze various decisions by courts surrounding obscenity in conjunction with wider cultural attitudes about adult entertainment in order to shed some light on the question: why, in spite of its legal and protected status, is adult content and adult content production still a stigmatizing and polarizing dimension of U.S. culture?

II. DEVELOPMENTS DURING THE REEL ERA (1957–1974)

Throughout the early part of the Reel Era, adult content production was shaped by legal ambiguity, industry and community fragmentation, and stigma. As the years passed, however, courts addressed obscenity by analyzing it from a constitutional standpoint, which set the stage for adult industry development.[10]

A. *Before the Reel Era Began*

The history of sexually graphic moving imagery is extensive. Production of stag films—silent, single-reel films with minimal narrative arch,

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6. *Id.* To put this in comparative perspective, the Hollywood film industry generated 9.25 billion dollars worth of revenue in 2006. *Domestic Theatrical Market Summary for 2006*, THE NUMBERS, http://www.the-numbers.com/market/2006/summary (last visited Oct. 25, 2012). Consider this in conjunction with an estimated 3.6 billion dollars worth of "adult film" content rental and sales only in 2006. McMahon, *supra* note 2.

7. Chris Morris, *Porn Industry Looks for New Money Spinners*, CNBC (Jan. 6, 2011, 9:24 AM), http://www.cnbc.com/id/40896321/Porn_Industry_Looks_For_New_Money_Spinners. *But see* Susannah Breslin, *How Porn Went From Boom to Bust*, FORBES (July 11, 2012, 9:51 PM), http://www.forbes.com/sites/susannahbreslin/2012/07/11/how-porn-went-from-boom-to-bust/ (outlining the decline of the porn industry).

8. Stanley v. Georgia, 394 U.S. 557, 568 (1969) (holding that simple possession of pornography is protected by the First Amendment).

9. *See generally*, *History*, PORN HARMS, http://pornharms.com/mim/about-mim/ (last visited Oct. 20, 2012) (describing the objectives of Morality in Media, Inc., a faith-based agency that advocates for stricter federal obscenity laws).

10. *See* Butler v. Michigan, 352 U.S. 380, 383 (1957) (noting that the government cannot "reduce the adult population . . . to reading only what is fit for children"); *see also* Miller v. California, 414 U.S. 15, 24 (1973) (setting criteria to judge obscenity as a whole, including "prurient interest").

featuring nudity and varying degrees of sexually explicit content—can be traced back to the early 1900s in Europe and Latin America.[11] The earliest known stag film made in the United States, *A Free Ride*, also known as *A Grass Sandwich*, dates back to 1915.[12] In these early years, all texts (including stag films) were subject to the Comstock Law's (1873) vaguely worded definition of "smut" as any "obscene, lewd, or lascivious . . . article or thing designed, adapted, or intended . . . for any indecent or immoral use . . . ."[13] This ambiguous conceptualization of what constitutes obscenity relegated early production, presentation, and reception of stag films to the private social sphere, making them the "private preserve of private individuals."[14]

Obscenity became more clearly defined, however, in 1930 based on a decision from the U.S. Southern District Court of New York.[15] Judge Woolsey ruled that James Joyce's *Ulysses* was not obscene since the text did not contain representations or discussions of sex that constituted "dirt for dirt's sake."[16] Although it is likely that the content of most stag films would have been considered "dirt for dirt's sake," Woolsey's ruling established an anchoring point by which "explicit" texts could be evaluated.[17] For stag films, the door to the public sphere opened ever so slightly.

Another "explicit" film genre emerged in the US around the time of stag: the 1920s exploitation film.[18] Under the auspices of imparting educational or moral lessons on eager audiences, classic "sexploitation" films often featured depictions unheard of in mainstream movies.[19] "Sex-

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11. Jim Holliday, *A History of Modern Pornographic Film and Video*, in PORN 101: EROTICISM, PORNOGRAPHY, AND THE FIRST AMENDMENT 341–51 (James Elias et al. eds., 1999).

12. Tim Dirks, *Sexual – Erotic Films Part 1*, FILMSITE, http://www.filmsite.org/sexualfilms.html (last updated Aug. 23, 2011).

13. Comstock Act, 18 U.S.C.A. § 1461 (1873) (repealed 1971).

14. LINDA WILLIAMS, HARD CORE: POWER, PLEASURE, AND THE "FRENZY OF THE VISIBLE" 86 (1989).

15. United States v. One Book Called "Ulysses," 5 F.Supp. 182, 185 (S.D.N.Y. 1933) ("It is only with the normal person that the law is concerned. Such a test as I have described, therefore, is the only proper test of obscenity in the case of a book like 'Ulysses which is a sincere and serious attempt to devise a new literary method for the observation and description of mankind.").

16. *Id.* at 184.

17. WILLIAMS, *supra* note 14, at 87. *See generally* Marisa Anne Pagnattaro, *Carving a Literary Exception: The Obscenity Standard and Ulysses*, *in* TWENTIETH-CENTURY LITERATURE 217–37 (2001) ("*Ulysses* [changed] the obscenity standard of all literature. The intellectual significance of *Ulysses* was the catalyst for what has essentially become an exception to obscenity laws for literary works.").

18. Eric Schaefer, *Gauging a Revolution: 16mm Film and the Rise of the Pornographic Feature*, *in* PORN STUDIES 372 (2004).

19. *Id.*

ploitation" films included footage from nudist camps, graphic depictions of the effects of venereal disease, stripteases, and more, giving viewers a glimpse of footage that was never seen in feature films.[20] Sexploitation films went unchecked by obscenity standards due to the presence of the ever-present "square up"—a brief educational statement and disclaimer outlining the film's high moral purpose.[21]

When the Hollywood film industry's studio system collapsed in the 1950s and its self-imposed internal regulation standards went by the wayside, a new phenomenon known as "Nudie Cuties" emerged.[22] Taking sexploitation narratives and content in a different direction, Nudie Cuties featured sexualized content, nudity, and occasional simulated sex without the pretense of educational or moral purpose.[23] Although Nudie Cuties' racy content flew beneath the vague radar of obscenity, the content of stag films did not. These depictions of sexual activity were risky to produce and sell.[24] In 1957, however, the U.S. Supreme Court's decision in *Roth v. United States*[25] revolutionized film production of all genres – stag, Nudie Cutie, and mainstream alike.

The Court affirmed the constitutionality of two state and federal obscenity statutes, holding that "obscenity [was] not within the area of constitutionally protected speech or press" under the First Amendment or the Due Process Clause of the Fourteenth Amendment.[26] It liberalized the definition of obscenity, however, by placing its identification in the hands of "average person[s] applying contemporary community stan-

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20. *Id.* at 372–73.

21. *Id.* at 373.

22. *Id. See generally* Eric Schaefer, *Pandering to the "Goon Trade" Framing the Sexploitation Audience Through Advertising*, *in* SLEAZE ARTISTS: CINEMA AT THE MARGINS OF TASTE, STYLE AND POLITICS 19–23 (2007) (providing insight into how Nudie-Cutie films were advertised and produced).

23. *See* Schaefer, *Gauging a Revolution*, *supra* note 18 ("[A] new crop of so-called Nudie-Cuties . . . contained nudity but did not have an educational imprimatur."); *see also* THE IMMORAL MR. TEAS (Pad-Ram Enterprises 1959) (recognized as the first of the Nudie-Cutie films).

24. *See* Richard Corliss, *That Old Feeling: When Porno Was Chic*, TIME, Mar. 29, 2005, at A2 (explaining that in an era where it was prohibited to curse or show female breasts in public, actors in the so-called "stag films" would often cover their faces to mask their identity).

25. 354 U.S. 476, 485 (1957).

26. *Roth*, 354 U.S. at 485. In upholding the obscenity convictions of two businesspersons engaged in mailing pornographic materials, the Court established a two-part test for obscenity: "[W]hether [1] to the average person, applying contemporary community standards, [2] the dominant theme of the material taken as a whole appeals to prurient interest." *Id.* at 489 (emphasis added).

dards."[27] Without further elaboration from the Court as to *whose* community was the standard, this opinion opened doors for early adult industry development and growth.[28]

B. *Jurisprudential Regulations of Obscenity During the Reel Era (1957-1974)*

In 1957, the *Roth* decision articulated a legal definition of obscenity that both liberalized and continued to limit production of sexually explicit content throughout most of the Reel Era. In 1973, the *Miller v. California*[29] decision further clarified the legal definition of obscenity, creating a stable legal groundwork for the production of adult content and the developing adult content production industry. The *Miller* decision did not, however, come easy—the following key cases were integral to the specifics of the decision itself.

In *Roth*, the U.S. Supreme Court determined that obscene texts were not constitutionally protected as free speech or press.[30] The Supreme Court rejected an older definition of obscenity in favor of a modern test[31]

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27. *See* Dennis W. Chiu, *Obscenity on the Internet: Local Community Standards for Obscenity Are Unworkable on the Information Superhighway*, 36 SANTA CLARA L. REV. 185, 190 (1995) (exploring the evolving standards of obscenity).

28. *See* FREDERICK S. LANE III, MEDIATION: OBSCENE PROFITS: THE ENTREPRENEURS OF PORNOGRAPHY IN THE CYBER AGE 25–26 (2000) (describing the period between 1957 and 1973 as the "Golden Age of Porn"). The author notes that "[by] emphasizing the latitude offered by words and phrases like 'dominant theme,' 'taken as a whole,' and 'utterly,' defenders of sexually oriented materials were able to use the *Roth* decision to free a wide range of materials that previously had been banned . . . ." *Id.*

29. 413 U.S. 15 (1973). *See* Carol Daugherty Rasnic, *The U.S. Supreme Court on Affirmative Action: Are Some of Us "More Equal" Than Others? (With Some Comparisons to Post-Good Friday Agreement Police Hiring in Northern Ireland)*, 7 SCHOLAR 23, 48 (2004) (discussing the *Roth*, *Miller*, and *Memoirs* cases).

30. *See Roth*, 354 U.S. at 485 ("We hold that obscenity is not within the area of constitutionally protected speech or press.").

31. *See id.* at 488–89. As authority for the older obscenity test, the Supreme Court cites *Regina v. Hicklin*, (1868) L.R. 3 Q.B. 360, a seminal nineteenth-century English case addressing obscenity. *Roth*, 354 U.S. at 489; *see also* Kenneth W. Masters, Comment, *Law in the Electronic Brothel: How Postmodern Media Affect First Amendment Obscenity Doctrine*, 15 U. PUGET SOUND L. REV. 415, 423 (1992) (providing a legal-historical context for *Hicklin* and recognizing that "[t]he *Hicklin* test also allowed the courts to find an entire work obscene based on any portion of the work, rather than requiring examination of the work as a whole."). *See generally* Reg v. Hickline, 11 Cox's Criminal Cases 19, 11 Reports of Cases in Criminal Law, Argued and Determined in All the Courts in England and Ireland 19 (1871). The Court states that the *Hicklin* test was the "early leading standard of obscenity . . . ." *Roth*, 354 U.S. at 488. According to the Court, the *Hicklin* test allowed for "material to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons." *Id.* at 488–89. The Court found this to be "unconstitutionally restrictive" in

that lower courts had already adopted.[32] The Court described the new obscenity test as "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole, appeals to prurient interests."[33] And while the Supreme Court couched its application of the new obscenity test as the application of a "substituted standard," the Court stated emphatically that the new standard "provides safeguards adequate to withstand the charge of constitutional infirmity."[34] Further, the Court quoted approvingly from language used by one of the trial courts[35] in its jury charge which defined "obscene, lewd and lascivious" for legal purposes as "that form of immorality which has relation to sexual impurity and has a tendency to excite lustful thoughts."[36] While the Court's decision in *Roth* did offer a standard for obscenity and, consequently, a jurisprudential foothold for persons working with adult content, its inherently vague nature required repeated clarification during the Reel Era.[37]

In 1966, the Supreme Court again addressed the obscenity issue in its *Memoirs*[38] decision. In *Memoirs*, the Court recited the obscenity stan-

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that it "might well encompass" legitimate material by improperly focusing on the effect isolated passages might have "upon the most susceptible persons." *Id.* at 489.

32. *See Roth*, 354 U.S. at 489 n.26 (citing several recent state and federal court decisions that apply a modern standard for obscenity).

33. *Id.* Commentators have recognized that the Supreme Court's decision in *Roth*, by moving away from the common-law *Hicklin* test, established a "modern test for obscenity." Richard L. Purdon, *Pornography in the Dormitories: A Commander's Dilemma*, 14 A. F. L. REV. 146, 146 (1973). This being the case, the Supreme Court's jurisprudence surrounding the obscenity issue continued to develop after the Roth decision. *See generally* Tim K. Boone, Comment, *The "Virtual" Network: Why Miller v. California's Local Community Standard Should Remain Unchanged in the Wake of the Ninth Circuit's Kilbride Decision*, 6 LIBERTY U. L. REV. 347, 349–53 (2012) (outlining legal developments in the Supreme Court's obscenity jurisprudence after the Roth decision).

34. *Roth*, 354 U.S. at 489.

35. *See id.* at 480–81 (addressing how the Supreme Court's decision in Roth consolidated two separate cases). In one case, a jury for the Southern District of New York convicted Samuel Ross, a businessman, for "mailing obscene circulars and advertising, and an obscene book in violation of the federal obscenity statute." *Id.* at 480. In the other case, a judge in Los Angeles County, California had convicted David Alberts, the owner of a "mail-order business," of a misdemeanor offense for "lewdly keeping for sale obscene and indecent books, and with writing, composing, and publishing an obscene advertisement of them, in violation of the California Penal Code." *Id.* at 481.

36. *Id.* at 486.

37. While *Roth* proved to be "a landmark decision relating to obscenity law," the Supreme Court "continued to modify and to struggle with the test it had formulated." Tim K. Boone, Comment, *The "Virtual" Network: Why Miller v. California's Local Community Standard Should Remain Unchanged in the Wake of the Ninth Circuit's Kilbride Decision*, 6 LIBERTY U. L. REV. 347, 350 (2012).

38. 383 U.S. 413, 416–17 (1966).

dard directly from its decision in *Roth*[39] and then proceeded to identify three elements that "must coalesce" as the constituent parts of the already established *Roth* obscenity standard:

> the dominant theme of the material taken as a whole appeals to a prurient interest in sex;
> the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and
> (c) the material is utterly without redeeming social value.[40]

In *Memoirs*, the Supreme Court ultimately reversed the trial court's obscenity determination by finding error in the trial court's interpretation of the "social value criterion."[41] In doing so, the Court heightened the *Roth* obscenity test and found, specifically, that "a book cannot be proscribed unless it is found to be utterly without redeeming social value."[42] This is an example of one of the nuances inherent in the obscenity standard articulated by the Court in its *Roth* decision.

While cases such as *A Book Named "John Cleland's Memoirs of a Woman of Pleasure"* highlighted vagaries in identifying obscene texts,[43] other cases touched on private individuals' rights and culpability when dealing with obscene materials.[44] For example, the *Smith v. California*[45] decision stated that persons, such as bookstore proprietors, could not be held liable for obscenity violations if they had no knowledge that the items in their possession were deemed to be obscene.[46] The *Marcus v.*

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39. *See id.* at 418 ("Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.") (quoting *Roth*, 354 U.S. at 489). *See* Carol Daugherty Rasnic, *The U.S. Supreme Court on Affirmative Action: Are Some of Us "More Equal" Than Others? (With Some Comparisons to Post-Good Friday Agreement Police Hiring in Northern Ireland)*, 7 SCHOLAR 23, 48 (2004) (discussing the *Roth*, *Miller*, and *Memoirs* cases).

40. *Memoirs*, 383 U.S. at 418.

41. *Id.*

42. *Id.* at 419.

43. *See id.* at 418–20 (discussing the application of the three-pronged *Roth* test for obscenity and highlighting the erroneous interpretation of the third component of the test by the Massachusetts court).

44. Smith v. California, 361 U.S. 147, 147 (1959).

45. *Id.*

46. *Id.* at 152. The Court stated:

> But our holding in Roth does not recognize any state power to restrict the dissemination of books which are not obscene; and we think this ordinance's strict liability feature would tend seriously to have that effect, by penalizing booksellers, even though they had not the slightest notice of the character of the books they sold.

Id.

Search Warrant of 104 East Tenth Street[47] decision asserted that a person's constitutional right to due process could not be violated in instances where obscenity was suspected.[48] Furthermore, the *Stanley v. Georgia*[49] ruling established that simple possession of obscene material was not a violation of obscenity law.[50]

Although these and many other cases worked to clarify obscenity, *Roth's* ambiguities came to a head when Marvin Miller was convicted by the State of California for distributing unsolicited, sexually explicit materials via U.S. mail.[51] The subsequent *Miller v. California* decision overturned Miller's conviction and clarified the obscenity standards articulated in *Roth*[52] by defining obscenity as:

> (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest;
> (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
> (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[53]

Roth's "utterly without redeeming social value"[54] measure was not adopted into the *Miller* test.[55]

As these cases illustrate, what constituted obscenity and what constituted a violation of *obscenity law* transitioned from being ambiguous at best to relatively defined during the Reel Era.[56] The *Miller* decision clari-

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47. Marcus v. Search Warrant of 104 E. Tenth St., 367 U.S. 717, 731–32 (1961).

48. *Id.*

49. 394 U.S. 557, 557 (1969).

50. *Id.* at 568. The Court stated that making mere possession of materials that were obscene would be a violation of the First and Fourteenth Amendments. *Id.*

51. United States v. Miller, 455 F.2d 899, 899–901 (9th Cir. 1972), *vacated*, 413 U.S. 913 (1973).

52. *See generally* Miller v. California, 413 U.S. 15 (1973) (discussing how the *Roth* standard applied to Marvin Miller's case).

53. *Id.* at 24.

54. Memoirs v. Masschusetts 383 U.S. 413, 418 (1966).

55. Miller v. California, 413 U.S. 15, 24–25 (1973).

56. *See* Stanley v. Georgia, 394 U.S. 557, 559 (1969) ("[T]hat [ ] mere private possession of obscene matter cannot constitutionally be made a crime."); *see also* Memoirs v. Masschusetts 383 U.S. 413, 418 (1966) (defining three elements needed to make material obscene "it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."); Smith v. California, 361 U.S. 147, 153 (1959) (deciding whether unknown possession of obscene

fied the legal definition of obscenity and created a stable legal foundation for the production of sexually explicit adult content.[57] This enabled a fragmented collection of persons to begin building an industry.[58]

C. *The Limiting Role of Technology*

By establishing a basis for the determination of obscenity, the *Roth* decision marked the beginning of the Reel Era.[59] Under the protection of the ambiguous "community" and given the difficulty in demonstrating a polysemic text to be "utterly" without any redeeming social value, underground stag films evolved into brief "loops" and full-length sexually-oriented feature films over the course of the Reel Era.[60]

The actual consumption of adult content during these years, however, required reel projection technology, which itself required considerable space and pricey equipment.[61] This had a limiting effect on both the pro-

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material is a violation of obscenity law was examined two years later and it was held that it would be unreasonable to require every bookseller to make himself "aware of the contents of every book in his shop."). The Court stated, "sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest. The portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press." Roth v. United States, 345 U.S. 476, 487(1957) (distinguishing between sex and obscenity). In defining obscenity the Court would find material obscene if "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." *Id.* at 489. *But see* P. Heath Brockwell, Comment, *Grappling with Miller v. California: The Search for an Alternative Approach to Regulating Obscenity*, 24 CUMB. L. REV. 131, 131 (1994) (asserting the difficulty in regulating obscenity).

57. Miller v. California, 413 U.S. 15, 24–25 (1973).

58. While defining obscenity the *Miller* test "was widely viewed as a limitation on what sexually explicit material could safely be published . . . ." LANE III, *supra* note 28, at xvii. Due to the aforementioned view changes were made in order "to lessen their legal exposure." *Id.* However, Larry Flynt was able to start the Hustler magazine one year after the *Miller* decision. *Id.* at xviii ("The mere fact that Flynt was able to launch and operate a magazine as avowedly crude and misogynistic as *Hustler* is ample evidence, however, that it was impossible for the *Miller* court to turn the judicial clock back to 1957, when it handed down the *Roth* decision.").

59. *See* Chauntelle Anne Tibbals, *From The Devil in Miss Jones to DMJ6 – Power, Inequality, and Consistency in the Content of US Adult Films*, 13 SEXUALITIES 625, 627 (2010) ("[The] U[.]S[.] adult film industry[ ] _ [had] three predominant production eras, Reel (1957–1974), Video (1975–1994), and Digital/Virtual (1995–ongoing) . . . .").

60. *See* Brian L. Frye, *The Dialectic of Obscenity*, 35 HAMLINE L. REV. 229, 232 (2012) (noting that under the *Roth* decision, the difference between art and pornography is hard to tell as "both are in the eye of the beholder."); *see also* Amy Adler, *All Porn All the Time*, 31 N.Y.U. REV. L. & SOC. CHANGE 695, 695 (2007) ("Because of shifts in our culture and, most prominently, shifts in technology . . . pornography has been transformed.").

61. *See* Tibbals, *From The Devil supra* note 59, at 628–29 (estimating that films made in this era made profits similar to blockbuster hits).

duction and consumption of adult films.[62] Though wealthier persons may have had access to in-home theatres, by which they may have viewed adult content—for example, Linda Lovelace discusses viewing adult films in the home of Playboy entrepreneur Hugh Hefner[63]—the vast majority of adult content had to be viewed in public venues.[64] Consequently, adult theaters and peep show houses were often located in "red-light district" areas where community standards were less conservative.[65]

III. DEVELOPMENTS DURING THE VIDEO ERA (1975–1994)

During the Video Era of adult content production, jurisprudential regulations[66] and developing technology impacted the growth and development of the adult entertainment industry overall.[67] Specifically, the advent of videocassette recorder technology created an unprecedented demand for adult content,[68] while jurisprudential decisions concentrated the industry geographically and further clarified the limits of legal adult content.[69] The adult content production industry did not, however, experience an era of unchecked growth.[70] Opposition from the wider culture

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62. *See id.* at 629 (asserting that until everyone had easy access to such materials the demand remained lower).

63. *See* LINDA LOVELACE WITH MIKE MCGRADY, ORDEAL: THE TRUTH BEHIND DEEP THROAT 10 (1980) (stating that Linda Lovelace was a frequent guest at the Playboy Mansion).

64. *See* Steve McMillen, *Adult Uses and the First Amendment: The Stringfellow's Decision and its Impact on Municipal Control of Adult Businesses*, 15 TOURO L. REV. 241, 252–54 (1998) (listing the effects the adult entertainment industry may have on surrounding communities).

65. *See id.* (listing the effects the adult entertainment industry may have on surrounding communities); *see also* LANE III, *supra* note 28, at 26 (explaining that adult theaters were generally located in unsavory urban areas).

66. *See* John M. Armento, *Effective Regulation of Adult Entertainment Uses*, 26 REAL EST. L.J. 69, 69 (1997) (listing ways local governments tried to regulate the adult entertainment industry).

67. *See* Jonathan Coopersmith, *Pornography, Technology and Progress*, *in* ICON 104 (1998) (describing that the invention of the VCR created a larger consumer base for pornography users who wanted to maintain privacy).

68. *See id.* (describing that the invention of the VCR created a larger consumer base for pornography users who wanted to maintain privacy).

69. *See* Steven I. Brody, *When First Amendment Principles and Zoning Regulations Collide*, 12 N. ILL. U. L. REV. 671, 672 (1992) (explaining that conflicts arise between local governments attempt to create zoning laws as a regulation to the sex industry and the businesses that provide these services).

70. *See* Jeffery M. Bryan, *Sexual Morality: An Analysis of Dominance Feminism, Christian Theology, and the First Amendment*, 84 U. DET. MERCY L. REV. 655, 708–09 (2007) (analyzing the opposition to pornography by some feminists and some Christians).

in the form of some feminist and conservative political activists attempted to contain, and even eradicate, the developing industry.[71]

A. *Developing Technology*

In 1975, Sony's videocassette recorder (VCR) technology revolutionized the industry and marked the beginning of the Video Era.[72] Rather than engender requisite visits to public venues where adult reels were shown, it was now possible for relatively "average" persons to view adult films in the privacy of their own homes.[73]

As is the case with any new technology, some years had to pass before the market became saturated.[74] According to Frederick S. Lane III, "less than 1[%] of all Americans owned a [VCR] in 1979" but 87% did just one decade later.[75] The general population needed time to become aware of and familiar with the VCR, and its initially prohibitively high price needed to decrease.[76] It was during wider society's process of familiarization with and acquisition of VCR technology that the "Golden Age" (1975–1983)[77] of adult content production occurred.

Subsequent to the mainstream "acceptance" of the early 1970s "porno chic" phenomenon, adult film filmmaking began during porn's Golden Age.[78] According to Jim Holliday, seventy percent of the best adult films ever made were produced during these years.[79] Big budget, thought-provoking titles such as *The Opening of Misty Beethoven* (1976)[80] and *Café*

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71. *See id.* (highlighting how pornography counters both feminist- and Christian-based doctrine).

72. GORDON HAWKINS & FRANKLIN E. ZIMRING, PORNOGRAPHY IN A FREE SOCIETY 38 (1988); *see also* LANE III, *supra* note 28, at 33 ("What adult film makers needed was a means of distribution . . . . They got their wish in 1975, when Sony released its videocassette recorder. It quickly became an enormously popular technology . . . ."); Chauntelle Anne Tibbals, *Sex Work, Office Work: Women Working Behind the Scenes in the US Adult Film Industry*, GENDER, WORK & ORG. (Blackwell) 2011, at 7.

73. *See* LANE III, *supra* note 28, at 33 (explaining how consumers of pornographic material could preserve their privacy when video cassettes were introduced into the technology industry; Dawn C. Chmielewski & Claire Hoffman, *Porn Industry Again at the Tech Forefront*, L.A. TIMES, Apr. 19, 2006, http://articles.latimes.com/2006/apr/19/business/fi-porn19 (discussing how the introduction of DVDs has impacted the revenue of the porn industry); Rich, *supra* note 1 (exploring the capitalist aspect of the pornography industry).

74. *See* LANE III, *supra* note 28, at 33 (discussing the graduation of pornography from reel to video).

75. *Id.*

76. *See* Rich, *supra* note 1 (discussing the evolution of the production of pornography).

77. Holliday, *supra* note 11.

78. Tibbals, *From The Devil*, *supra* note 59, at 629.

79. Holliday, *supra* note 11.

80. Tibbals, *From The Devil*, *supra* note 59, at 629.

Flesh (1982)[81] projected grittier images of humanity and human sexuality, while the steadily less-expensive VCR worked its way into the homes of everyday citizens. Consumer demand soared as it became easier to view adult content privately. These demands were met by relatively low budget and quickly produced filler "fluff" from the West Coast, and films like *New Wave Hookers* (1985) and *Miami Spice II* (1986) couched adult content in mainstream cultural elements.[82] Production and distribution companies began to open—and sometimes close—rapidly as the days of the thoughtful, artistic, and erotic Golden Age hardcore film waned.

VCR technology and the culture's eventual saturation in it opened the proverbial floodgates for adult content production.[83] There was money to be made in light of this new technology, and several key jurisprudential findings facilitated the emergence of cohesive industry in the West.[84]

B. *Jurisprudential Regulations, Geographic Concentration, and Further Refinement of Obscenity*

Jurisprudential regulations had a significant impact on the development of the adult content production industry during the Video Era. The *California v. Freeman*[85] decision, for example, facilitated geographic concentration of the adult industry in Southern California's San Fernando Valley,[86] and a series of decisions established the illegality of all graphic sexual content featuring children under the age of eighteen.[87]

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81. *Id.*

82. *Id.* at 635.

83. Peter Alilunas, *The Death and Life of the Back Room*, MEDIA FIELDS J., 2010, at 1, 4 (discusses the profitability of back rooms in local and chain video stores for pornography rentals and their easy availability and access).

84. *See generally* Smith v. California, 361 U.S. 147 (1959) (determining that strict liability cannot be imposed on a bookseller possessing obscene material).

85. *See generally* California v. Freeman, 758 P.2d 1128 (1988) (addressing the First Amendment's correlation to pornography production in California).

86. *Corporate America Cashing In on Porn*, ABC NEWS, http://abcnews.go.com/Business/story?id=87275&page=1#.UHjBaml25_h (last visited Oct. 12, 2012) ("The modern porn industry was born in California's San Fernando Valley, where it had two huge boosts from new technologies.").

87. CAL. PENAL CODE § 311.1 (West 2012) (establishing the illegality of producing a media showing a person under eighteen performing a sexual act); *Id.* § 311.2 (West 2012) (establishing the illegality of producing a media showing a person under eighteen performing a sexual act); *Id.* § 311.3 (West 2012) (establishes the illegality of producing a form of media showing a person under eighteen performing a sexual act and defining what a sexual act is); *Id.* § 311.4 (West 2012) (banning employment of a person under eighteen for a sexual performance).

As the Reel Era passed and adult film production entered its Golden Age, the fragmented industry began to concentrate steadily in the West.[88] People currently working in the adult industry and people interested in getting started—all of whom desired to capitalize on the steadily increasing demand for adult content—eventually headed to Los Angeles, specifically to the San Fernando Valley.[89] Once an endless sea of orange groves, many people have speculated as to why the San Fernando Valley became the epicenter of adult film production during the 1980s. Los Angelenos' (presumably) liberal nature, the Valley's proximity to Hollywood and the mainstream film and music industries, the weather, and the availability of endless, non-descript commercial-industrial office spaces are all factors that may possibly have contributed. These factors, and certainly many others, were secondary however to the primary reason porn concentrated in the San Fernando Valley: California was the first place in the United States to legalize adult content production.[90]

Although notions of community standards characterized determinations of obscenity, would-be members of corresponding communities often disagreed about what constituted obscenity or its place in the public sphere. For example, the Supreme Court in *Paris Adult Theatre I v. Slaton*[91] found that the exhibition of obscene material in places of public accommodation is not protected by any constitutional doctrine of privacy.[92] A little over a decade later, the Court upheld a city zoning ordinance prohibiting theaters showcasing adult content from locating within 1,000 feet of a residential zone, church, park, or school.[93] These exhibition and zoning regulations established fairly straightforward community boundaries for the adult industry, but state pandering laws related to the solicitation of paid sexual services continued to limit adult content production itself.[94]

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88. Kelly Shibari, *You Can Only Shoot Porn in California, Right?*, THE PRISM GROUP (Dec. 17, 2008), http://hourglass8.com/shoot-porn-californiaright/.

89. *Id.*

90. *Id.*

91. 413 U.S. 49, 66 (1973).

92. *Id.*

93. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 54 (1986) (holding that Renton's zoning ordinance "sought to make some areas available for adult theaters and their patrons, while at the same time preserving the quality of life in the community at large by preventing those theaters from locating in other areas.").

94. *See also* Young v. American Mini Theatres, Inc., 427 U.S. 50, 54–55 (1976) (finding that a Detroit zoning ordinance that prohibited adult movie theaters from being located within 1,000 feet of two other regulated uses did not violate the Equal Protection Clause)

> The 1972 [Detroit] ordinances were amendments to an 'Anti-Skid Row Ordinance' which had been adopted 10 years earlier. At that time the Detroit Common Council made a finding that some uses of property are especially injurious to a neighborhood

In 1983, director and producer Harold Freeman hired five women to perform in one of his adult-oriented films.[95] Freeman, who was based in the San Fernando Valley, was then arrested, charged with, and convicted for five counts of pandering.[96] Freeman however had paid these women for their performances in his film, not for the purpose of his own sexual arousal or gratification.[97] Upon reading the State's appeal, it was evident to the California Supreme Court that the conviction was less about upholding relevant laws and more about limiting porn production.[98] Consequently, the U.S. Supreme Court denied the state of California's request for a stay of enforcement in *California v. Freeman*, reversed Freeman's conviction, and effectively "legaliz[ed]" adult content production in California.[99] The *Freeman* decision set the stage for unprecedented legal growth and development of an industry centered on adult content production.

From automobiles to foodstuffs to cosmetics, quality and safety standards monitor the products produced by any industry. During the mid-1970s to early 1980s, the *Miller* test for obscenity served as the effective standard for monitoring the quality and safety of the developing adult

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when they are concentrated in limited areas. The decision to add adult motion picture theaters and adult bookstores to the list of businesses . . . was, in part, a response to the significant growth in the number of such establishments.

Id. Philip M. Cohen, Case Note, *People v. Freeman—No End Runs On the Obscenity Field Or You Can't Catch Me From Behind*, 9 LOY. ENT. L. J. 69, 70 (1989) (discussing how law enforcement officials use the state's pandering laws in an attempt to control the proliferation of pornographic materials). *But see* Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 65–66 (1981) (reversing adult bookstore owners' convictions for operating a coin-operated live, and usually nude, dance on the grounds that local ordinance's exclusion of live entertainment from a broad range of commercial uses permitted in Borough was not justified).

95. Philip M. Cohen, Case Note, *People v. Freeman—No End Runs on the Obscenity Field or You Can't Catch Me from Behind*, 9 LOY. L.A. ENT. L. REV. 69, 71 (1989).

96. *Id.*

97. *See id.* at 71, 83 (providing factual background of the 1988 People v. Freeman California Supreme Court case); *see also* People v. Freeman, 46 Cal. 3d 419, 422, 424–25 (1988).

98. *See Freeman*, 46 Cal. 3d at 427 (considering the State's argument that the legitimate governmental interest in restricting Freeman's First Amendment rights was the enforcement of its pandering laws, Justice Kaufman observed that Freeman's charges "ha[d] little if anything to do with the purpose of combating prostitution. Rather, the self-evident purpose . . . in bringing these charges was to prevent profiteering in *pornography* . . . .").

99. *See* California v. Freeman, 488 U.S. 1311, 1315 (1988) (denying the State's request for a stay of the California Supreme Court's judgment on the grounds that the decision "rest[ed] on an adequate and independent state ground.").

entertainment industry.[100] Further articulation of obscenity and the general legal standards for adult content became necessary, however, in light of an emerging problem: the presence of underage persons as performers in various forms of adult content.[101]

The *Stanley v. Georgia* decision determined that simply possessing obscene material was not in of itself illegal.[102] The *New York v. Ferber*[103] decision, however, refined the *Stanley v. Georgia* holding.[104] Paul Ferber, an adult bookstore proprietor, was convicted of violating New York state obscenity laws when he sold material containing graphic sexual images of boys under the age of sixteen.[105] Largely because of the findings in *Stanley v. Georgia*, this decision was appealed and eventually was heard by the U.S. Supreme Court.[106]

The Court found that material containing graphic sexual images of children under the age of sixteen could be banned without first determining obscenity or violation of obscenity law because 1) it is in the best interest of the state to protect children from sexual exploitation; 2) distribution of graphic sexual images of children constitutes sexual abuse; 3) the possibility of selling such content provides an economic motive for producing such images; 4) any artistic value that could possibly be found in such depictions is negligible; and 5) because content-based classifications of speech may be accepted or rejected when it is appropriately generalized

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100. *See* John Fee, *Obscenity and the World Wide Web*, 2007 BYU L. REV. 1691, 1695–96 (2007) (claiming that the *Miller* standard was a success for defending pornography during the 1970s and early 1980s).

101. *See* Jason Collum, *Behind Every Picture, There's Pain: Justice Department Makes Long-Awaited Entrance Into Battle Against Child Porn*, AFA.ORG (Oct. 2001), www.afajournal.org/2001/october/pornography.asp (explaining that there was an emerging "child pornography" problem in the 1970s and 1980s that needed legal reform to hold it back); *see also* Fee, *supra* note 100, at 1696 (claiming that the success of the *Miller* standard in defending pornography during the 1970s and early 1980s affected the Supreme Court's creation of a bright-line test in *New York v. Ferber* to "hold that child pornography is categorically unprotected by the First Amendment."). *See generally* DIANA E. H. RUSSELL, Stolen Innocence: The Damaging Effects of Child Pornography–On and Off the Internet 50–56, *available at* www.dianarussell.com/f/4BOOK2.pdf (providing an overview of the legal history of "child pornography" and the subsequent legal actions taken to prevent its continued proliferation).

102. Stanley v. Georgia, 394 U.S. 557, 567 (1969)

103. 458 U.S. 747, 773 (1982).

104. *See* New York v. Ferber, 458 U.S. 747, 773 (1982) (finding that states may "constitutionally prohibit [the] dissemination of material" that uses a child in a "sexual performance").

105. *Ferber*, 458 U.S. at 751–52.

106. *Id.* at 774 (reversing the New York Court of Appeals and remanding the case to that court). "States have a legitimate interest in prohibiting dissemination or exhibition of obscene materials when . . . [there is] significant danger . . . of exposure to juveniles." *Id.* at 754–55.

within the confines of the given classification that the negative effect(s) of its being restricted is overwhelmingly outweighed by the interest(s) of its being restricted.[107] Thus, all graphic sexual images of children under the age of sixteen are illegal regardless of obscenity as outlined by the *Miller* test.[108]

The U.S. Supreme Court thus upheld the New York court's decision, however it rearticulated the basis for Ferber's conviction—it became about the sexual exploitation of children, rather than obscenity.[109] This decision was significant in that it closed a gaping loophole in the *Miller* test by which it was possible to feature graphic sexual images of children.[110] Subsequently passed, the Child Protection and Obscenity Enforcement Act formally states that any person involved in the direct or indirect sexual exploitation of children via the production of visual images is committing a punishable offense.[111] Title 18, Section 2257 of the U.S. Code outlines proof of age record keeping requirements, colloquially known as the 2257 Regulations, intended to aid in enforcement of the Child Protection and Obscenity Enforcement Act.[112] Further, in *Osborne v. Ohio*[113] the Court held that a state "may constitutionally proscribe the possession and viewing of child pornography" in spite of obscenity and any possible First Amendment protections.[114]

One final clarification tied to the production of "child pornography" and the culpability of adult persons involved therein emerged as a direct result of the case of Nora Kuzma, an underage girl who became one of the adult industry's most popular performers during the 1980s.[115] With a borrowed birth certificate and a subsequently acquired legal California identification card "proving" she was twenty-two year old Kristie Nussman,[116] Nora Kuzma became a nude figure model at age fifteen.[117] By

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107. *Id.* at 761–64.

108. *See Adult Entertainment: FAQs*, FIRST AMENDMENT CENTER, http://archive.firstamendmentcenter.org/speech/adultent/faqs.aspx?id=506& (last updated Oct. 14, 2012) (reiterating that "the *Miller* test concerns obscenity, not child pornography" and "that child pornography [is] a separate category of expression that receive[s] no First Amendment protection. . . . ." Therefore, the *Miller* test is not applicable when trying to determine if something is "child pornography.").

109. *Ferber*, 458 U.S. at 756 ("The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.").

110. *Id.*

111. Child Protection and Obscenity Enforcement Act, 18 U.S.C. § 2251 (2006).

112. *Id.* § 2257.

113. 495 U.S. 103, 111 (1990).

114. *Id.*

115. TRACI ELIZABETH LORDS, TRACI LORDS: UNDERNEATH IT ALL 56 (2003).

116. *Id.*

117. *Id.*

sixteen, Kuzma had become one of the most recognized and sought after performers in the adult industry—Traci Lords.[118] Kuzma's true identity and age were revealed in May 1986, just days after her eighteenth birthday.[119]

According to Kuzma's autobiography (which she authored under the legally-adopted moniker Traci Elizabeth Lords), authorities had been aware of her case for three years – essentially the entire time she had been working in the adult entertainment industry.[120] Industry insiders reported being shown photographic documentation of Kuzma's earliest adult work taken by investigators during courses of questioning.[121] Apparently, authorities were long aware of Kuzma's deception;[122] however, members of the industry reportedly were not. Upon learning her true age and identity, many members of the adult industry reported feeling extremely guilty and foolish.[123] A Polaroid photo serendipitously snapped by prolific industry photographer Suze Randall showing Kuzma with her Nussman identification was one of the only pieces of evidence that prevented the industry's immediate shutdown.[124]

Regardless of the industry's misinformation about Kuzma's age, countless units of what was now known illegal "child pornography" were removed from producers' warehouses and destroyed and most persons immediately ceased any dealings in her products.[125] Undercover investigators were able to find one individual, Rubin "Ruby" Gottesman of X-

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118. *See Traci Lords*, ADULT ENTERTAINMENT BROADCAST NETWORK, http://www.imdb.com/name/nm0000183/bio (explaining that "Traci made somewhere between 80 and 100 X-rated movies . . . between 1984 and 1986.").

119. "In May 1986 she was arrested by FBI agents when it was discovered she was underage, which meant that any films with her in them were illegal to rent or buy, and video stores around the country rushed to remove them." *Biography for Traci Lords*, IMDB, http://www.imdb.com/name/nm0000183/bio (last visited on Oct. 25, 2012).

120. LORDS, *supra* note 115.

121. LEGS MCNEIL ET AL., THE OTHER HOLLYWOOD: THE UNCENSORED ORAL HISTORY OF THE PORN FILM INDUSTRY 417 (2005).

122. Interview by Larry King with Traci Lords (July 14, 2003), *available at* http://transcripts.cnn.com/TRANSCRIPTS/0307/14/lkl.00.html (describing the three-year preparation of the FBI raid that culminated in Lords' apartment in May of 1986).

123. *Id.* ("She's a manipulative little girl, and this is what she—manipulative woman, and this is what she did, and she victimized us").

124. MCNEIL ET AL., *supra* note 121, at 410.

125. Nina K. Martin, *The Meese Commission and the Sex Wars—Discourses on Pornography*, FILM REFERENCE, http://www.filmreference.com/encyclopedia/Independent-Film-Road-Movies/Pornography-THE-MEESE-COMMISSION-AND-THE-SEX-WARS-DISCOURSES-ON-PORNOGRAPHY.html (last visited Oct. 25, 2012) (crediting The National Obscenity Enforcement Unit, created under the administration of President Ronald Reagan, lead to the destruction of films made by Traci Lords while she was under the age of eighteen for the purpose of avoiding being those with her pornographic works in their possession held criminally liable for "child pornography").

Citement Video, who had learned of Kuzma's true age but was still willing to include her in filming.[126]

Gottesman was subsequently convicted of knowingly trafficking "child pornography" to Hawaii in 1987.[127] He appealed his conviction on the grounds of what he claimed was vague and overbroad wording present in the Protection of Children Against Sexual Exploitation Act of 1977.[128] The original conviction was upheld by the *United States v. X-Citement Video*[129] decision, which found that neither the statute used to convict Gottesman nor the statement that a minor under age eighteen (rather than sixteen) constituted underage personage were overbroad and/or unconstitutional.[130] It is important to note that, with the exception of Gottesman, not one member of the adult industry was convicted of producing, possessing, or trafficking "child pornography" in light of the Kuzma case.

The Court's further clarification of what constitutes "child pornography" in *United States v. X-Citement Video* was incredibly significant,[131] and it is important to note that the production of such content does not occur in the U.S. professional adult content production industry.[132] According to Marty Klein,"[t]he American porn industry neither makes nor distributes erotic material featuring underage performers. The underage material available today is either (1) amateur stuff made by individuals and distributed surreptitiously, or (2) made by foreign producers in Russia, Eastern Europe, and Asia, with no affiliation with American businesses."[133] This does not, however, mean that recorded instances of

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126. United States v. X-Citement Video, Inc., 513 U.S. 64, 66 (1994).

127. *See id.* (discussing the meaning of "child pornography").

128. *See id.* (stating the Ninth Circuit's stance that the Protection of Children Against Sexual Exploitation Act was facially unconstitutional).

129. 513 U.S. 64, 66 (1994).

130. *Id.* at 78.

131. *See id.* (clarifying the term "knowingly" as applying to both the "sexually explicit nature of the material and to the age of the performers."). *See generally* Child Protection and Obscenity Enforcement Act, 18 U.S.C. § 2251 (2006) (establishing that is a crime for any person to allow or entice a minor to engage in sexually explicit conduct for the purpose of visually depicting such conduct and to transport such visual depictions in commerce; also outlines penalties); *Id.* § 2252 (2006) (detailing conduct that constitutes the knowing transporting of sexually explicit conduct involving minors and corresponding punishments).

132. *See* MARTY KLEIN, AMERICA'S WAR ON SEX 128 (2006) (stating that production of graphic sexual images containing minors is not a part of the adult content production industry in the United States).

133. *Id.* (stating that production of graphic sexual images featuring minors is not a part of the adult content production industry in the United States); *see also* Robert D. Richards & Clay Calvert, *Obscenity Prosecutions and the Bush Administration: The Inside Perspective of the Adult Entertainment Industry & Defense Attorney Louis Sirkin*, 14 VILL. SPORTS & ENT. L.J. 233, 277 (2007) (interviewing an adult film director Max Hardcore in the wake of the U.S. Department of Justice's federal grand jury indictment for obscenity

minor-aged child sexual abuse do not exist in contemporary U.S. culture.[134] Indeed, such illegal content does exist–it occasionally it even originates with minors themselves[135]–and it is a steadily intensifying problem.[136]

In spite of its *non*-involvement with recorded instances of minor-aged child sexual abuse, the adult production industry has taken its own steps to identify and prevent the sexual exploitation of children via the production of visual imagery.[137] For example, through technically developed during the Digital/Virtual Era, the U.S. adult entertainment industry established the non-profit Association of Sites Advocating for Child Protection (ASACP) in 1996.[138] ASACP is dedicated to eliminating recorded instances of minor-aged child sexual abuse and preventing underage persons from viewing adult content online.[139] The organization is funded by

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against JM Productions). Hardcore states, "The reality is that no mainstream pornographer has anything whatsoever to do with child pornography. Of course, we know this, but the public doesn't know this." *Id. See also* Robert D. Richards & Clay Calvert, *Untangling Child Pornography from the Adult Entertainment Industry: An Inside Look at the Industry's Efforts to Protect Minors*, 44 CAL. W. L. REV. 511, 527 (2008) (providing a transcript of an interview with Joan Irvine, executive director of the Association of Sites Advocating Child Protection, in which she recounts a quote from FBI agent Dan Larkin, who affirmed that the federal agency knew "the industry is not involved in this and that it is organized crime that is involved in child pornography, mainly out of the Eastern European bloc countries.").

134. *See, e.g.*, Press Release, Fed. Bureau of Investigation, Norfolk Div., Newport News Man Sentenced to 50 Years for Producing Child Pornography (Oct. 12, 2012) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*) (exemplifying recent cases of "child pornography" being recorded outside the professional adult entertainment industry).

135. *See* Mary Graw Leary, *Self-Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Exploitation*, 15 VA. J. SOC. POL'Y & L. 1, 4–5 (2007) (noting the increasing incidences of juveniles engaging in "self-exploitation" and producing amateur, adult-oriented content for distribution on the Internet).

136. *See* U.N. Committee on the Rights of the Child, Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography: Report of the United States of America and U.S. Response to Recommendations in Committee Concluding Observations of June 25, 2008, 5–6, Jan. 22, 2010 (indicating an overall upward trend in child pornography incidents being reported to the National Center for Missing and Exploited Children's CyberTipline from 1998 to 2008).

137. *See* ASS'N OF SITES ADVOCATING CHILD PROTECTION, http://www.asacp.org/index.php?content=About us (last visited Oct. 14, 2012) (listing members of ASACP's Advisory council, that include prominent consolidators of the adult content industry).

138. *See* ASS'N OF SITES ADVOCATING CHILD PROTECTION, http://www.asacp.org (last visited Oct. 14, 2012) (affirming establishment of ASACP in 1996 by adult industry to abate transmission of "child pornography").

139. *See id.* (describing the efforts of ASACP to eliminate "child pornography," including the establishment of an international reporting hotline, creation of the "Restricted to Adults" content warning, supporting the efforts of the adult industry online to help

many of the industry's most influential content producers, and its advisory board includes CEOs from some of the industry's most prominent organizations.[140]

IV. ACTIVISM INSIDE AND OUTSIDE THE ADULT INDUSTRY

Fueled by the cumulative effects of increasing consumer demand, the protective standards of the *Miller* test,[141] the increasing ubiquity of videocassette recorder technology,[142] and the legality of porn production in California,[143] a cohesive adult content production industry began to develop and flourish during the 1980s. The industry did not, however, experience unchecked growth. This was due in part to emerging tensions between the adult industry and some feminist and conservative activists, scholars, and politicians. An unexpected alliance between radical feminist activists, scholars, and political conservatives, along with former adult performer Linda Boreman,[144] assembled and rallied against the developing adult industry.

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combat child sex abuse, and collaborating with parents to keep children from viewing sexually explicit content online).

140. *See* ASS'N OF SITES ADVOCATING CHILD PROTECTION, *supra* note 137 (listing members of ASACP's Advisory council, including Theo Sapoutzis, CEO of Adult Video News Media, the world's largest consolidator of adult entertainment, and Alec Helmy, founder and CEO of Xbiz.com, a U.S.-based publisher of trade information related to the adult content industry); *see also* ASACP—YOUTUBE, http://www.youtube.com/user/asacprta (last visited Oct. 14, 2012) (featuring high profile adult entertainment performers in public service announcements supporting ASACP's mission and encouraging parents to heed the Restricted to Adults warning label created by ASACP).

141. *See* Miller v. California, 413 U.S. 15, 16 (1973) (alluding to the test established in *Miller* where, "[a] work may be subject to state regulation where that work, taken as a whole, appeals to the prurient interest in sex; portrays, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and, taken as a whole, does not have serious literary, artistic, political, or scientific value.").

142. *See* 17 U.S.C.S. § 1201(k)(4)(A) (West 2012) (explaining that with the invention of the video cassette recorder came the convenience of a device that would easily record video and audio portions of a television program, motion picture, or other form of audiovisual work).

143. *See* Bill W. Sanford, *"Virtually" a Minor: Resolving the Potential Loophole in the Texas Child Pornography Statute*, 33 ST. MARY'S L.J. 549, 558–59 (2002) (referring to the landmark decision in *Miller* where pornography was found to be legal so long as it was contained within certain definitions).

144. Colleen Long, *'Linda Lovelace' Dies*, CBSNEWS.COM, http://www.cbsnews.com/2100-207_162-506940.html (last visited Oct. 13, 2012).

A. *Feminist and Conservative Anti-Pornography Activism*

1. A Most Unlikely Poster-Girl

Linda Susan Boreman was born in New York on January 10, 1949.[145] She would eventually come to be known as Linda Lovelace, star of the infamous Reel Era porno chic film *Deep Throat*.[146] Accounts of her life during the late 1960s and early 1970s are almost universally engaged by anti-pornography activists and scholars. In 1969, Boreman was recuperating from a near-fatal car accident when she met Chuck Traynor.[147] They married soon after, and Traynor very quickly became Boreman's "suitcase pimp."[148] Traynor, a brutally aggressive man and textbook suitcase pimp, subjected Boreman to years of violent sexual servitude.[149] This included forced performance in sexually graphic and extreme loops and reels including *Dogorama*,[150] *Piss Orgy*,[151] *The Foot*,[152] and *Dog Fucker 2*.[153] Traynor eventually dubbed Boreman "Linda Lovelace" for her role in Gerard Damiano's film *Deep Throat*.[154] This film and Boreman's public image would come to epitomize "porno chic" during the 1970s.[155]

Boreman eventually managed to escape Traynor in 1973.[156] She went into hiding for several months but eventually emerged and attempted to cultivate a career in the mainstream film industry; however, she was of-

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145. *See id.* (outlining critical events in the life of Linda Boreman).

146. *See id.* (explaining the life and death of adult performer turned anti-porn activist Linda Boreman, whose stage name was Linda Lovelace).

147. LOVELACE, ORDEAL, *supra* note 63.

148. GLORIA STEINEM, OUTRAGEOUS ACTS AND EVERYDAY REBELLIONS 244 (Holt, Rinehart, and Winston, 1st ed. 1983) (describing Lovelace's husband Chuck Traynor as her "keeper," highlighting his possessive hold over her). The derisive industry euphemism "suitcase pimp" refers to a husband or boyfriend acting as a woman performer's assistant, manager, companion, and supervisor. Tristan Taormino, *Pimpin' Ain't Easy*, THE VILLAGE VOICE COLUMNS (Aug. 16, 2010), http://www.villagevoice.com/2005-08-16/columns/pimpin-ain-t-easy/. These men usually have little (if any) connection to adult film production and are therefore attempting to cultivate some involvement in the industry by "pimping" their woman partner. Tristan Taormino, *Pimpin' Ain't Easy*, THE VILLAGE VOICE COLUMNS (Aug. 16, 2010), http://www.villagevoice.com/2005-08-16/columns/pimpin-ain-t-easy/.

149. STEINEM, *supra* note 148, at 245 (describing Lovelace's permanent injury to the blood vessels in her legs as a result of numerous rapes and beatings).

150. DOGORAMA (Eager, Enthusiastic & Excited 1972) (also titled "Dog Fucker").

151. PISS ORGY (Eager, Enthusiastic & Excited 1971).

152. THE FOOT (Eager, Enthusiastic & Excited 1972).

153. DOG FUCKER 2 (Eager, Enthusiastic & Excited 1972) (also called "Dog 2").

154. DEEP THROAT (Gerard Damiano Film Productions 1972).

155. *See* STEINEM, *supra* note 148, at 243 ([*Deep Throat*] [ ] was the porn movie that made porn movies chic . . . .").

156. *Id.* at 247.

fered very little work, none of artistic merit or quality, all requiring some degree of simulated sex and/or nudity.[157] Boreman refused most of these roles.[158]

Broke and extremely stigmatized, she eventually married her childhood friend Larry Marchiano[159] and published her own account of her life as Linda Lovelace, *Ordeal*,[160] and a follow-up memoir entitled *Out of Bondage*.[161] In an effort to garner attention for *Ordeal*, Boreman made a promotional appearance on "The Phil Donahue Show" in 1980.[162] This appearance facilitated her connection with Gloria Steinem and an emerging legion of feminist anti-pornography activists.[163]

While Linda Boreman was working to rebuild her life during the mid to late 1970s, many feminist activists and scholars were critiquing sexist and violent imagery found in U.S. culture and media; this included imagery found in some adult content.[164] These critiques came in many forms, including writings, on-the-ground activism, and proposed legal changes.[165] For example, notable activists and scholars wrote polemical essays against pornography, highlighting the significant harmful effects they felt it had

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157. *Id.*

158. *Id.*

159. *Id.* at 246.

160. *See generally* LOVELACE, ORDEAL, *supra* note 63 (illuminating Linda Boreman's transformation into "Linda Lovelace," an international adult film star).

161. *See generally* LINDA LOVELACE WITH MIKE MCGRADY, OUT OF BONDAGE (1986) (detailing Linda Boreman's life post-*Deep Throat* that highlights her experiences as a wife, mother and activist in the anti-pornography movement).

162. STEINEM, *supra* note 148, at 248.

163. *Id.* at 251.

164. *See* NADINE STROSSEN, DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS 12, 73 (1995) (explaining the conservative and feminist movements of the 1970s and the tension between stricter legal restrictions for this type of imagery and the prejudicial term "pornography"); *see, e.g.*, Michael F. Jacobsen, *Sexism and Sexuality in Advertising*, MARKETING MADNESS: A SURVIVAL GUIDE FOR A CONSUMER SOCIETY, at 74 (1995), *available at* http://www.uky.edu/~aubel2/eng104/paranoia/pdf/jacobsen.pdf (discussing advertisements depicting women and violence).

165. *See* STROSSEN, DEFENDING PORNOGRAPHY, *supra* note 164, at 61–62, 73 (discussing the response to the sexual revolution of the 1960s and 1970s and actions taken to reform the advertising industry); *see, e.g.*, Carolyn M. Byerly, *Overview: Women and Media, a Global Perspective*, IIP DIGITAL U.S. DEP'T OF STATE (Sept. 10, 2012), http://iipdigital.usembassy.gov/st/english/publication/2012/02/20120228112618ael0.8913472.html#axzz29K3nl9On (discussing the history of women in the media and the feminist movement); William Brennan, *Female Objects of Semantic Dehumanization and Violence*, THE FEMINISM AND NONVIOLENCE STUDIES ASS'N J. (Summer 1995), http://www.fnsa.org/v1n3/brennan1.html (giving examples of how women were and are dehumanized and portrayed in a violet manner in the media).

on women.[166] One such collection of essays, Laura Lederer's edited *Take Back the Night: Women on Pornography*, includes contributions from notables Alice Walker, Andrea Dworkin, Gloria Steinem, Charlotte Bunch, and Audre Lorde, among many others.[167] In another example, the activist/protest collective Women Against Pornography (WAP) was formed in New York in 1979.[168] Linda Boreman became very active with WAP and a prominent spokesperson for the organization via her connection with WAP-supporter Gloria Steinem.[169]

The pursuit of pro-censorship, anti-pornography jurisprudential measures became another critical endeavor for many feminist activists and scholars. Attorney Catharine MacKinnon and activist Andrea Dworkin coauthored a city ordinance, which stated that the existence of pornographic materials violated the civil rights of all women in Minneapolis, Minnesota.[170] Public hearings wherein testimony was heard on behalf of the proposed legislation were held, and members of Women Against Pornography, including Linda Boreman, were invited to testify.[171] In December of 1983, Boreman related much of the same information she had published several years earlier in *Ordeal* before the Minneapolis City

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166. *See, e.g.*, Samuel J. Scott, *Porn Industry: It's Harmful Effects on Society*, SAMUEL J. SCOTT BLOG (May 27, 2010), http://www.samueljscott.com/2010/05/27/porn-industry/ (explaining alleged consequences of the pornography industry); Wendy McElroy, *A Feminist Overview of Pornography, Ending in a Defense Theory Thereof*, WENDY MCELROY, http://www.wendymcelroy.com/freeinqu.htm (last visited Oct. 25, 2012) (providing an overview the different pornography views).

167. *See* LAURA LEDERER, TAKE BACK THE NIGHT 28, 35, 91, 95, 148, 256, 286, 295 (1980) (compiling pieces from notable anti-pornography activists).

168. STROSSEN, DEFENDING PORNOGRAPHY, *supra* note 164.

169. *See* STEINEM, *supra* note 148, at 243 (discussing Linda Lovelace); *see also* Gloria Steinem, *The Real Linda Lovelace*, AGAINST PORNOGRAPHY (2008–2012) https://againstpornography.org/reallindalovelace.html (restating the assertion and giving more information about the connection between Gloria Steinem and Linda Boreman).

170. MacKinnon and Dworkin's ordinance passed in Minneapolis but was later overturned as unconstitutional by the District Court; *see* David M. Edwards, *Politics and Pornography: A Comparison of the Findings of the President's Commission and the Meese Commission and the Resulting Response*, http://home.earthlink.net/~durangodave/html/writing/Censorship.htm (last visited Oct. 14, 2012) (stating this decision was upheld by the United States Court of Appeals in 1985); *see generally Model Antipornography Civil-Rights Ordinance*, NO STATUS QUO WEBSITES, http://www.nostatusquo.com/ACLU/dworkin/other/ordinance/newday/AppD.htm (last visited Oct. 14, 2012) (giving an example of an anti-pornography ordinance).

171. *See* Pat Califia, *The Obscene, Disgusting, and Vile Meese Commission Report*, CULTRONIX (1986), http://cultronix.eserver.org/califia/meese/ (explaining the events that led up to the public hearings and the result of those hearings).

Council.[172] Much of Boreman's testimony from the Minneapolis Proceedings would reappear a few years later.[173]

2. Political Conservatives and Feminists Allied against Pornography

Conservative U.S. President Ronald Reagan announced his intention to study the effects of pornography on society in 1984.[174] It has been speculated that Reagan's true intent was to overturn the findings of 1970's Presidential Commission on Pornography, which found no link between sexually explicit material and criminal or violent behavior.[175] Attorney General Edwin Meese assembled an eleven-member pornography information task force in May 1985.[176] Members of the "Meese Commission" were given one year and approximately half a million dollars to evaluate pornography and its effects in the United States.[177] Their find-

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172. *See generally Catharine MacKinnon*, DEMOCRATIC UNDERGROUND (May 22, 2012, 9:59 AM), http://www.democraticunderground.com/12552704 (discussing the life of Catharine MacKinnon and her affiliations).

173. *See* OFFICE OF THE ATT'Y GEN., U.S. DEP'T OF JUSTICE, ATT'Y GEN.'S COMM'N ON PORNOGRAPHY: FINAL REPORT 215 (1986), *available at* http://www.communitydefense.org/lawlibrary/agreport.html (investigating the issue of pornography; referred to as the Meese Report); *see generally* FAYE GINSBURG & ANNA LOWENHAUPT TSING, UNCERTAIN TERMS 119 (1990) (providing more information about the Final Report of the Attorney General's Commission on pornography).

174. David M. Edwards, *A Comparison of the Findings of the President's Commission and the Meese Commission and the Resulting Response*, POLITICS AND PORNOGRAPHY (1992), http://home.earthlink.net/~durangodave/html/writing/Censorship.htm. Because there was an increase in pornography in the 1970's and 1980's, the concerns about "violent consequences and dangerous sexuality" also increased. This prompted President Reagan to appoint a Commission "to study the effects of pornography." MARJORIE L. COPPOCK, PORNIFYING AMERICA: RAPE OF THE CULTURE AND WHAT CAN BE DONE 13 (2012), *available at* http://www.wrestlingwithangels.com/AddictiveAndDeadly.pdf.

175. *See* Califia, *supra* note 171 (stating that an appointed Commission has the mandate to overturn the 1970 Presidential Commission on Pornography). *See* Edwards, *A Comparison of the Findings*, *supra* note 174 (stating the goal was to obtain results more acceptable to conservatives.).

176. OFFICE OF THE ATT'Y GEN., *supra* note 173; *see* Edwards, *A Comparison of the Findings*, *supra* note 174 (stating that Attorney General Meese appointed eleven members to the panel). While the *Final Report* and the Edwards article state there were eleven members on the commission, the report itself lists twelve members along with their biographies. The Commission members were: Henry Hudson, Dr. Judith Veronica Becker, Diane Cusack, Park Elliot Dietz, Dr. James Dobson, Judge Edward Garcia, Ellen Levine, Tex Lezar, Father Bruce Ritter, Professor Frederick Schauer, Deanne Tilton, and Alan Sears. OFFICE OF THE ATT'Y GEN., *supra* note 173, at 3–21. In her article on the Meese Commission, Pat Califia also lists all twelve members of the Commission. *See* Califia, *supra* note 171 (listing the twelve members along with a brief statement of each member's credentials).

177. Califia, *supra* note 171. The Commission itself knew there were budgetary and time constraints. The members admit that they were able to formulate hypothesis "in ways

ings were published in the *Attorney General's Commission on Pornography: Final Report (Final Report)*.[178]

The Commission's determinations and recommendations relied heavily upon victim and expert written and oral testimony.[179] Individuals who believed that they or someone they knew closely had been physically or psychologically harmed by pornography were invited to testify or submit a written statement recounting their experiences.[180] Excerpts from this data, including testimony from Linda Boreman[181] and Andrea Dworkin,[182] are reprinted in the *Final Report*. The Commission stated in the introduction to these testimonies that there was no way to conclusively determine whether pornography was responsible for survivors' duress beyond public records.[183] Consequently, only some testimony could be verified; unverifiable testimonies, however, were treated in the same manner as those with records.[184] Thirty total testimonies were heard by the committee over the course of twelve public hearings from June 1985 through January 1986 in Washington D.C., Chicago, Houston, Los Angeles, Miami, and New York.[185]

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that [were] either more novel or more precise than those reflected in the existing thinking on the subject," but were unable to test the hypothesis due to budgetary and time constraints. OFFICE OF THE ATT'Y GEN., *supra* note 173, at 218.

178. OFFICE OF THE ATT'Y GEN., *supra* note 173, at 218.

179. *See id.* at 219–20 (discussing the people who gave testimony, why they gave the testimony, and the importance of the testimony).

180. *Id.* at 767.

181. *Id.* at 787. Linda Boreman, who was also known as Linda Lovelace, was an adult performer known for her role in *Deep Throat*. She was married to Larry Marchiano at the time she testified before the Meese Commission; therefore in the report her name is Linda Marchiano. *Linda Lovelace*, BIO TRUE STORY, http://www.biography.com/print/profile/linda-lovelace-262763 (last visited Oct. 9, 2012).

182. OFFICE OF THE ATT'Y GEN., *supra* note 173, at 769–72. Andrea Dworkin was known for her "unrelenting and unforgiving stance on pornography." "Her past as a battered wife and prostitute led her to become a major opponent for the fight for equal rights for women." Ashyia N. Henderson, *Andrea Dworkin*, ENCYCLOPEDIA OF WORLD BIOGRAPHY http://www.notablebiographies.com/newsmakers2/2006-A-Ec/Dworkin-Andrea.html (last visited Oct. 9, 2012).

183. OFFICE OF THE ATT'Y GEN., *supra* note 173, at 768. Even though not all testimonies could be verified, based on Edward Donnerstein's research, the Commission found a "causal relationship between exposure to sexually violent materials and an increase in aggressive behavior toward women." MARJORIE L. COPPOCK, PORNIFYING AMERICA: RAPE OF THE CULTURE AND WHAT CAN BE DONE 13 (2012), *available at* http://www.wrestlingwithangels.com/AddictiveAndDeadly.pdf.

184. OFFICE OF THE ATT'Y GEN., *supra* note 173, at 767.

185. *Id.* at 766. The eleven Commission committee members directly heard thirty testimonies; however, fifty-one more individuals were formally invited to testify before them. For reasons undisclosed in the Final Report, each of these fifty-one formally invited individuals did not testify. Commission staff investigators heard an additional 196 testimonies from various expert witnesses, and a total of 127 individuals submitted written statements.

In spite of the involvement of many notable persons, the clear ringer of the entire Meese Commission process was the starlet of the new pornographic age, Linda Lovelace.[186] By using Boreman's graphic, tragic, and extreme account of a life *supposedly* leveled by pornography, radical feminists and conservative politicians were able to have a flesh and bone example of how destructive adult content and its production *supposedly* actually were.[187] Reliance on this one example, however, was perilous at best.[188]

Boreman's case as it is related in her autobiographical texts and testimony is an undeniably horrific example of extreme physical, mental, and sexual abuse at the hands of one's partner.[189] Details of her personal life notwithstanding, according to Nadine Strossen the case of Linda Boreman is not representative of the developing adult industry—not of the Reel Era during which it occurred, nor of the Video Era during which it was engaged—for the following two reasons. First, by her own account, Boreman was in no way abused or coerced by members of the adult industry.[190] Her husband, Chuck Traynor, did this.[191] Second, Boreman's

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Id. at 766, 1845–59, 1861–63, 1865–71. According to Nobile and Nadler, there were even more individuals with whom committee members and the Commission spoke to informally about testifying. PHILIP NOBILE AND ERIC NADLER, UNITED STATES OF AMERICA V. SEX 27 (1986). Once it was determined that these testimonies would not support the Commission's anti-pornography agenda, formal invitations to testify were not extended. *Id.*

186. *See* STROSSEN, DEFENDING PORNOGRAPHY, *supra* note 164, at 182 (identifying Linda Marchiano as the starlet of *Deep Throat* and as a heavily cited example in support of censorship).

187. *See id.* (stating that "[i]n her 1980 book Ordeal, Marchiano describes how she was raped and in other ways forced to make the film against her will."); Robin West, *The Feminist-Conservative Anti-Pornography Alliance and the 1986 Attorney General's Commission on Pornography Report*, 1987 AM. B. FOUND. RES. J. 681, 687 (1987) (providing testimony by Boreman, of the coercion required to produce pornography).

188. *See* STROSSEN, DEFENDING PORNOGRAPHY, *supra* note 164, at 182–83 (explaining the logical fallacy in using Boreman's own account of her individual experiences); Robin West, *The Feminist-Conservative Anti-Pornography Alliance and the 1986 Attorney General's Commission on Pornography Report*, 1987 AM. B. FOUND. RES. J. 681, 691 (1987) (arguing that the commission failed to acknowledge that there is really some value to pornography, even in the face of the conservative value-based argument).

189. *See* STROSSEN, DEFENDING PORNOGRAPHY, *supra* note 164 (stating that Boreman was raped, beaten, and forced to take part in the film); Robin West, *The Feminist-Conservative Anti-Pornography Alliance and the 1986 Attorney General's Commission on Pornography Report*, 1987 AM. B. FOUND. RES. J. 681, 687 (1987) (providing the text of Boreman's testimony; she is quoted as stating that "she was forced through physical, mental, and sexual abuse and often at gunpoint and threats of her life to be involved with pornography").

190. *See* STROSSEN, DEFENDING PORNOGRAPHY, *supra* note 164 (stating that "Marchiano's [Boreman's] autobiographical writings . . . make clear that she experienced no abuse or force at the hands of participants in the porn industry . . . .").

account speaks to her experiences in the adult industry only.[192] Assuming she had been abused or coerced by members of the industry, which she, by her own word was not, one person's story cannot be used to characterize an entire segment of society. The use of her life story by feminists and conservatives as an exemplar during the Meese Commission was inappropriate, overbroad, manipulative, and exploitative. It is interesting, however, to consider the degree to which each group attempted to capitalize on the celebrity and tragedy of Linda Boreman in order to further their respective causes.

Through an attempt to reframe the boundaries of sexual acceptability, the Meese Commission actually intended to reassert a dominant and archaic, conservative yet somehow pro-feminist, standard of morality in U.S. culture during the 1980s.[193] Fortunately, the dangers that the Commission and the *Final Report* posed to the freedoms of speech and expression were quickly identified.[194] One public statement of those concerns was captured in *The Meese Commission Exposed*, a collective effort of feminists, authors, artists, and activists attempting to articulate the manner in which the pro-censorship commission was actually dangerous to U.S. society.[195] Actor Colleen Dewhurst, speaking on behalf of the Actor's Equity Association, pointed out the commission's lack of testimony from the artistic community, a group notoriously subject to censorship.[196]

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191. *See id.* (restating the fact that it was not other members of the porn industry abusing her, but rather her own husband, Chuck Traynor).

192. *See id.* (highlighting, again, that Boreman's account of her experiences really only speaks to what her husband at the time forced her to do, and as such serves as a poor basis for concluding that all other members of the porn industry suffered under similar circumstances).

193. Nadine Strossen, *A Feminist Critique of "The" Feminist Critique of Pornography*, 79 VA. L. REV. 1099, 1116 (1993) (quoting feminist Carole Vance stating "if the Meese commission gets its way, it will be because it has launched a novel propaganda offensive that superficially uses the rhetoric of social science and feminism [. . .] to disguise the traditional right-wing moral agenda.").

194. *See* Carole S. Vance, *Negotiating Sex and Gender in the Attorney General's Commission on Pornography*, *in* UNCERTAIN TERMS: NEGOTIATING GENDER IN AMERICAN CULTURE 118, 119 (Faye Ginsberg & Lowenhaupt Tsing eds., 1990) (asserting that the Commission's "ninety-two recommendations for strict legislation and law enforcement, backed by a substantial federal, state, and local apparatus already in place, pose a serious threat to free expression."); *see also* Harriet Pilpel, *The First Amendment*, *in* THE MEESE COMMISSION EXPOSED 6, 6 (1986) (arguing that the Meese Commission's working definition of pornography "could chill all kinds of speech and do much harm.").

195. *See generally* Leanne Katz, *Introduction*, *in* THE MEESE COMMISSION EXPOSED 5, 6 (1986) (stating that the purpose of the briefing is "to impart some sense of the broad range of views which are being ignored while important social policy is under consideration.").

196. *See* Colleen Dewhurst, *Drama*, *in* THE MEESE COMMISSION EXPOSED 9, 9 (1986) (criticizing the Meese Commission for not originally inviting to testify "theater organiza-

Author Kurt Vonnegut sarcastically indicated the culture's need to censor literary radicals responsible for impregnating society with conservatively questionable ideas.[197] Well-known feminist activist, Betty Friedan, articulated the manner in which the report was "a dangerous attempt to use a feminist smokescreen . . . [as] a weapon against sex discrimination."[198]

Although the Nora Kuzma/Traci Lords' "child pornography" case was not used as evidence in the Meese Commission, her case and Linda Boreman's were invoked regularly in anti-pornography activism.[199] In using these cases as examples, it would seem that women are systematically tortured and abused and children are sexually exploited in the adult

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tions, playwrights, actors, [and] writers . . . [,] arguing that this group "would be one of the most threatened by having their work suddenly termed obscene or not obscene.").

197. *See* Kurt Vonnegut, *Writing*, *in* THE MEESE COMMISSION EXPOSED 8, 8 (1986) (drawing a facetious comparison between the material analyzed by the Meese Commission and the First Amendment).

> I will read this most vile of all pieces of so[-]called literature aloud, so that those who dare can feel the full force of it. I recommend that all persons under 14, and all persons under 30 not accompanied by an adult, should leave the room. Those remaining who have heart trouble or respiratory difficulties, or who are prone to commit rape at the slightest provocation, may want to stick their fingers in their ears. And what I ask you to endure so briefly now is what the selfless members of the pornography commission do day after day for the good of our children. I am simply going to dip you in filth, and pull you out of it and wash you off immediately. At terrible risk of infection, they have to wallow in pornography. They are so fearless. We might think of them as a sort of sewer of astronauts. All right. Everybody ready? Tighten your G-strings. Here we go: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

Id.

198. Betty Friedan, *Feminism*, *in* THE MEESE COMMISSION EXPOSED 24, 24 (1986).

199. *See* CAROLYN BRONSTEIN, BATTLING PORNOGRAPHY: THE AMERICAN FEMINIST ANTI-PORNOGRAPHY MOVEMENT, 1976–1986, at 260 (2011) (writing on Boreman's role in Women Against Pornography's news conference held to promote her autobiography *Ordeal*, which detailed her experiences in the pornography industry; Bronstein stated that, "[s]he connected her exploitation with that of children, strengthening a new pattern within anti-pornography that portrayed women and girls as equally vulnerable in the sexual sphere."); *see also* Douglas Martin, *Linda Boreman, 53, Known For 1972 Film 'Deep Throat'*, N.Y. TIMES, Apr. 24, 2002, http://www.nytimes.com/2002/04/24/arts/linda-boreman-53-known-for-1972-film-deep-throat.html (reporting that Ms. Boreman, best known for her role in the film *Deep Throat*, later "testified about the dangers of pornography before Congress, courts, and city councils . . . and became a poster child for feminists like Gloria Steinem . . . ."); Interview by Larry King with Traci Lords, *supra* note 122 (indicating Lords put some blame on the pornography industry for her underage participation, quoting Lords as saying, "I wasn't unwilling. I was a girl, a young girl that was really confused, that was really angry, that definitely acted out. Yes, I lied about my age, but honestly, nobody really seemed to care that much. They wanted to make money.").

industry.[200] These cases, however, exemplify why conservative and feminist work done in opposition of the industry during the 1980s failed to shut down or even limit it. Although unquestionably tragic, both Boreman's and Kuzma's/Lords' cases point to the wider social problems of partner and child abuse,[201] child neglect,[202] and interpersonal manipulation, which cannot be viewed as the "fault" of the adult industry.[203]

Unfortunately, this type of finger pointing still occurs.[204] Pamela Paul claims the "culture of pornography," which includes "child pornography," catapults persons into unbridled sexual compulsivity.[205] Feminist author Naomi Wolfe states "pornography—and now internet pornography—[lowers women's] sense of their own sexual value and their actual

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200. *See* OFFICE OF THE ATT'Y GEN., *supra* note 173, at 868 (reporting on the adverse effects of pornography, testified to by various men, women, and children on the physical harm, psychological harm, and social harms allegedly caused by the involvement in the pornography industry).

201. *See* Jessica Ramos, *Defining Violence on the Blackboard: An Overview of the Texas Education Code's Approach to Teen Dating Violence*, 13 SCHOLAR 105, 109 (2010) (stating that "one in four teens experience dating violence in the form of . . . sexual abuse."); Alyse Faye Haugen, Comment, *When It Rains, It Pours: The Violence Against Women Act's Failure to Provide Shelter From the Storm of Domestic Violence*, 14 SCHOLAR 1035, 1044 (2012) (noting that although men are subject to domestic violence, women experience a much higher rate of abuse).

202. *See generally* Shirley Darby Howell, *Religious Treatment Exemption Statute: Betrayest Thou Me With a Statute?*, 14 SCHOLAR 945 (2012) (discussing child abuse within the context of parents' failure to seek medical attention for their children because of religious beliefs).

203. *See* OFFICE OF THE ATT'Y GEN., *supra* note 173, at 868 (concluding from the testimony of various participants in the pornography industry, that many who come into the industry have already experienced sexual abuse, stating that "the balance of the evidence suggests that models [in pornographic films] have typically grown up in circumstances of parental deprivation, abuse, or both."); *see also* James A. Chu, *The Revictimization of Adult Women With Histories of Childhood Abuse*, 1 J. PSYCHOTHERAPY PRAC. & RES. 259, 259 (1992) (providing data from a study on revictimization of women who had been victims of childhood incest, stating that these women "were found to be significantly more likely to be later victims of marital physical and sexual abuse, to be sexually approached by an authority figure, or to be asked to pose for pornography.").

204. Monica Shores, *Anti-Porn Activist's Ugly Attempts To Provoke Outrage*, HUFFINGTON POST (Feb. 18, 2011), http://www.huffingtonpost.com/monica-shores/antiporn-activists-ugly-a_b_809458.html (addressing the growing efforts of the anti-porn community to blame pornography on current societal ills.) Shores states that these attempts to demonize the adult sex industry have become increasingly far reaching with leaders in the movement associating everything from a woman's "inability" to refuse sex to young women's lack of sexual autonomy to the growth of pornography. *Id.*

205. PAMELA PAUL, PORNIFIED: HOW PORNOGRAPHY IS DAMAGING OUR LIVES, OUR RELATIONSHIPS, AND OUR FAMILIES (2006) (arguing that the unbridled ability to watch pornography on the internet at any time has caused a damaging ripple effect on today's culture).

sexual value."[206] Gail Dines, an anti-pornography activist and academic, states that "[a]s long as we have porn, [women] will never be seen as full human beings, deserving of all the rights that men have."[207] Katherine Kinnick claims that, because "popular culture and porn culture have become part of the same seamless continuum," pervasive exploitative images of women are viewed by some as normal.[208] Rather than developing a more nuanced understanding or analysis of pornography as a product of or participant in social and cultural shifts towards sexual ambivalence or desensitization, many people continue to simply and uncritically blame porn.[209]

B. *Adult Industry Activism*

Adult content producers and distributors began rallying around the issue of Free Speech in the late 1960s and started the first adult trade organization, the Adult Film Association of America (AFAA), in 1970.[210] The AFAA, which awarded creative and artistic awards for performance and production from 1976–1985, also doubled as the industry's trade organization during these days.[211] Most early AFAA members were adult performers.[212] Although not directly linked, the Free Speech Coalition took up the AFAA's initiative to protect industry members' constitutional rights in 1990.[213]

Through the late 1980s, the U.S. Federal government's conservative administration attacked the adult industry, targeting both producers and

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206. Naomi Wolf, *The Porn Myth*, N.Y. MAG., Oct. 20, 2003, http://nymag.com/nymetro/news/trends/n_9437/ (discussing the idea that overexposure to pornography has diluted, rather than enhanced the sexual appetites of U.S. society as a whole.) Wolf argues this ever-present imagery of sex in the media and on the Internet has led to, "A whole generation of men [who] are less able to connect erotically to women . . . ." *Id.*

207. Ronald Weitzer, *Pornography's Effects: The Need for Solid Evidence: A Review Essay of Everyday Pornography, edited by Karen Boyle (New York: Routledge, 2010) and Pornland: How Porn Has Hijacked Our Sexuality, by Gail Dines (Boston: Beacon, 2010)*, 17 VIOLENCE AGAINST WOMEN 667, 669 (Apr. 21, 2011), *available at* http://vaw.sagepub.com/content/17/5/666 (proposing that pornography has become so widespread and mainstream that we are now in the midst of a "porn culture.").

208. POP PORN: PORNOGRAPHY IN AMERICAN CULTURE 10 (MARDIA J. BISHOP & ANN C. HALL eds., 2007).

209. ROBERT J. STOLLER, PORN: MYTHS FOR THE TWENTIETH CENTURY vii (1991) (explaining that a scientific and more studied approached should be used when evaluating pornography and general erotica).

210. Joanne Cachapero & Diane Duke, *Free Speech Coalition: The Adult Industry Trade Association*, FREE SPEECH COAL. BLOG, http://fscblogger.wordpress.com/about/ (last visited Oct. 25, 2012).

211. *Id.*

212. *Id.*

213. *Id.*

distributors.[214] The success of these attacks varied. The Reagan administration's Meese Commission had little appreciable impact, whereas the George W. Bush administration's Child Exploitation and Obscenity Section (CEOS) succeeded in driving seven of the largest adult video distributors out of business.[215] In response to these attacks, industry leaders formed the Free Speech Legal Defense Fund (FSLDF) in 1990 to protect the rights of members in all areas of adult entertainment.[216] After FSLDF stayed attacks from the Bush administration, they decided to select a name more reflective of its broadened role in the adult community.[217] The adult entertainment industry trade association, Free Speech Coalition (FSC), thus was born.[218]

The FSC spent most of the liberal Clinton administration developing its organizational structure and even began lobbying the California state legislature in 1997.[219] The uneventful 1990s soon gave way to the FSC's most significant contribution to protecting free speech: the *Ashcroft v. Free Speech Coalition* decision of 2002.[220] As discussed previously, by 1994, jurisprudential regulations held that producing, trafficking, and possessing graphic sexual depictions of children under the age of eighteen were prohibited, regardless of demonstrated obscenity.[221] In 1996, the

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214. Nicholas Confessore, *Porn and Politics in a Digital Age*, FRONTLINE (Feb. 7, 2002), http://www.pbs.org/wgbh/pages/frontline/shows/porn/special/politics.html (discussing the rise of the anti-porn movement after pornography became more widely available through digital media).

215. *Id.*

216. Cachapero & Duke, *supra* note 210.

217. *Id.*

218. *Id.* (discussing the history of the formation of the Free Speech Coalition from its inception in the early 1970's to its prominence today as the leading proponent of the free expression of "adult themed works").

219. *See Free Speech Coalition*, FAIRNESS.COM, http://www.fairness.com/resources/relation?relation_id=66446 (last visited Oct. 25, 2012) (referring to then-Attorney General Janet Reno's apparent belief that obscenity was a victimless crime and convictions were becoming problematic to sustain based on developing local standards).

220. Ashcroft v. Free Speech Coal., 535 US 234 (2002). *See* Emily D. Goldberg, *How the Overturn of the Child Pornography Prevention Act Under Ashcroft v. Free Speech Coalition Contributes to the Protection of Children*, 10 CARDOZO WOMEN'S L.J. 175, 175 (2003) (stating the Supreme Court's decision in *Ashcroft* held the Child Pornography Prevention Act of 1996's ban on virtual "child pornography" "abridge[d] the freedom to engage in a substantial amount of lawful speech and is therefore overbroad and unconstitutional under the First Amendment.").

221. *See* Stanley v. Georgia, 394 U.S. 557, 557 (1969) (holding the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime); New York v. Ferber, 458 U.S. 747, 747 (1982) (holding the First Amendment does not protect child pornography); Osborne v. Ohio, 495 U.S. 103, 103 (1990) (holding that prohibitions against the possession and viewing of graphic sexual abuse of minors are constitutional and do not violate the First Amendment); United States v. X-Citement Video,

Child Pornography Prevention Act (CPPA) expanded the Supreme Court's decision to include what is commonly referred to as "virtual child pornography."[222] In addition to prohibiting the involvement of actual children, the CPPA added prohibitions against 1) any visual depictions that are or appear to be of minors engaging in sexually explicit conduct and 2) sexually explicit content that is advertised or promoted in such a manner that it conveys the impression that children are engaging in sexually explicit conduct.[223] In other words, computer-generated and/or graphically rendered images that depict "virtual children" engaged in sex behavior and/or advertisements for content featuring youthful looking adults (also, "virtual children") would be prohibited under the CPPA.[224]

When the George W. Bush administration, armed with the provisions of CPPA, fixed its gaze on porn and obscenity, the FSC filed suit.[225] Fol-

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513 U.S. 64, 64 (1994) (holding the mental-state requirement of "knowingly" in the Protection of Children Against Sexual Exploitation Act was intended by Congress to apply to the elements of the crime concerning minority of performers and the sexually explicit nature of the material).

222. *See* Child Pornography Prevention Act, Pub. L. No. 104-208, § 121(1)(3), 110 Stat. 3009 (1996) (finding "the use of children in the production of sexually explicit material, including photographs, films, videos, computer images, and other visual depictions, is a form of sexual abuse.").

223. *Free Speech Coal.*, 535 U.S. at 241–42.

> [C]hild pornography' means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—
>
> (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
>
> (B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct;
>
> (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or
>
> (D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct . . . .

Child Pornography Prevention Act, Pub. L. No. 104-208, § 121(2)(4), 110 Stat. 3009 (1996).

224. *See Free Speech Coal.*, 535 U.S. at 251 (stating that the court recognized in *Ferber* that "child pornography" could "rel[y] on virtual images—the very images prohibited by the CPAA—as an alternative and permissible means of expression" and that "a person over the statutory age who perhaps looked younger could be utilized") (citing *Ferber*, 458 U.S. at 763). *See also* Audrey Rodgers, *Playing Hide and Seek: How to Protect Virtual Pornographers and Actual Children on the Internet*, 50 VILL. L. REV. 87, 90 (2005) (basing the majority opinions decision to find the CPAA as unconstitutionally overbroad on the premise that pornography featuring virtual children poses no harm to actual children).

225. *See* Clay Calvert and Robert Richards, *The Free Speech Coalition & Adult Entertainment Industry: An Inside View of the Adult Entertainment Industry, Its Leading Advocate & the First Amendment*, 22 CARDOZO ARTS & ENT. L.J. 247, 282–83 (2004) (stating

lowing the *Ashcroft v. Free Speech Coalition* decision of 2002, the Act's provisions against "virtual child pornography" were held to be overbroad by the U.S. Supreme Court, and the prohibitive "child pornography" standards returned to pre-CPPA standards.[226] As a direct result of the FSC's efforts, many forms of speech—from Shakespeare's *Romeo and Juliet* and the Academy Award winning film *American Beauty* (1999) to Elegant Angel's *Teenage Anal Addicts* (2006) and Digital Sins' *Innocence of Youth* series—were protected by what the American Civil Liberties Union described as "the most important victory for the First Amendment in decades."[227]

The FSC has become the adult film industry's main defense against jurisprudential and legislative attacks from the mainstream regulators.[228] At all levels and stages of development, the FSC protects an individual's right to be directly or indirectly involved with adult content production, distribution, and consumption,[229] while simultaneously upholding existing obscenity laws and "child pornography" prohibitions.[230] Further, be-

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then Attorney General John Ashcroft pledged to renew the abandoned crusade against pornography, resulting in the investigation of several filmmakers and distributors of pornography).

226. *See* Ashcroft v. Free Speech Coal., 535 US 234, 234 (2002) ("[B]an on virtual child pornography in the CPAA abridges the freedom to engage in a substantial amount of lawful speech, and this is overbroad and unconstitutional under the First Amendment"). *See* Emily D. Goldberg, *How the Overturn of the Child Pornography Prevention Act Under Ashcroft v. Free Speech Coalition Contributes to the Protection of Children*, 10 Cardozo Women's L.J. 175, 183 (2003) (following *Ashcroft*, the House of Representatives passed the Child Obscenity and Pornography Prevention Act of 2003 (COPPA), but the language of the act remains overbroad and faces First Amendment challenges similar to those faced by CPPA).

227. *Free Speech Coalition*, *supra* note 219. Ashcroft v. Free Speech Coal., 535 US 234, 271 (2002) (Rehnquist, C.J., dissenting) (arguing the Academy Award winning films *Traffic* and *American Beauty* would have been made differently "had 'sexually explicit conduct' been thought to reach the sort of material the Court says it does.").

228. *See* Diane Duke, *Welcome Letter*, FREE SPEECH COALITION, http://www.free speechcoalition.com/about-us.html (last visited Oct. 25, 2012) (explaining the responsibilities of the Free Speech Coalition, which include serving as a guard for the adult film industry to protect against unconstitutional government intervention, serving as the voice to tell the truth about the adult film industry's economic and societal contributions, and lastly to ensure the success of the adult film industry by providing resources to members).

229. *See* Calvert & Richards, *The Free Speech Coalition & Adult Entertainment*, *supra* note 225, at 249 (stating that the Free Speech Coalition represents over six hundred individuals and businesses involved with presentation, production, distribution, and sale of adult-oriented materials).

230. *See* Brief for Respondents at 8, Ashcroft v. Free Speech Coal., 535 US 234, 271 (2002) (No. 00-795), 2001 WL 747841, at *9 (demonstrating that the Free Speech Coalition assists in preventing sexual abuse of minors by offering rewards up to ten thousand dollars to any person providing information that leads to an arrest and conviction of someone involved with "child pornography").

cause the adult industry is made up of a broad range of individuals, FSC advocacy protects the First and Fourth Amendment rights of a far-reaching community.[231]

V. DEVELOPMENTS DURING THE DIGITAL/VIRTUAL ERA (1995–2005)[232]

Technology, which once limited the adult industry, gave rise to virtually limitless production and distribution possibilities with the birth of the Internet in the mid-1990s.[233] Although no changes occurred around obscenity law, key jurisprudential decisions illustrate the ways in which developments in Internet technology have made legal definitions of obscenity very ambiguous.[234]

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231. Telephone Interview by Aaron Valadez with Reed Lee, Legal Committee Chair, Free Speech Coalition (Oct. 15, 2012) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*) (stating the Free Speech Coalition is the trade association for the adult industry and is geared to protecting their rights). The FSC's scope, however, actually involves protecting the rights of many individuals because the adult film industry covers a broad community, including performers, producers, and directors and all the individuals down the line, including retailers and even fans. *Id.* The FSC is mostly involved with obscenity litigation, which protects First Amendment rights and has also been involved with litigation dealing with unconstitutional zoning. *Id.* More recently, the FSC has been forced to protect Fourth Amendment rights after the passage of 18 U.S.C. § 2257 in 2006. *Id.* This record-keeping law requires anyone who produces adult material to obtain and maintain individually identifiable records of every performer, consisting of the performer's current name, any name used in the past by that performer, and the performer's date of birth. *Id.* In addition, this law requires that the records be kept at the business's premise and be made available to the Attorney General for inspection at all reasonable times. *Id.* The FSC is currently challenging the constitutionality of this law in the Third Circuit. Free Speech Coal. v. Attorney Gen., 677 F.3d 519, 524 (3d Cir. 2012). The case has been remanded to the district court to further explore the issues. *Id.* at 525.

232. The adult industry is currently in a state of significant flux and has been since the mid-2000s. It is my opinion that a new, fourth era is emerging. In order to provide some measure of historical depth and closure, I am cutting the Digital/Virtual era off in this essay at the year 2005.

233. *See* Jon Swartz, *Online Porn Often Leads High-Tech Way*, USA TODAY, Mar. 3, 2004, http://usatoday30.usatoday.com/money/industries/technology/2004-03-09-online-porn_x.htm (asserting that the internet allows anyone with a web camera and a connection to cheaply produce material and distribute that material instantaneously to millions). The ubiquitous nature of the Internet allowed porn purveyors to access the business from anywhere. *Id.* One entrepreneur said the "sex-tech combination went into hyper-drive with the emergence of the internet" in the mid-1990s. *Id.* Thousands of women created profitable websites that charge monthly for access to nude photographs and video clips. *Id.*

234. *See* Debra D. Burke, *Cybersmut and the First Amendment: A Call for a New Obscenity Standard*, 9 HARV. J.L. & TECH. 87, 100, 108–14 (1996) (identifying that the first two prongs of the *Miller* standard require a determination of "whether the work as a whole appeals to the prurient interest in sex and describes sexual conduct in a patently offensive way" using contemporary community standards). This standard creates jurisdictional in-

A. *Jurisprudential Regulations of Obscenity*

In 1995, "Danni's Hard Drive" provided the adult industry with a model by which Internet technology could be used to situate the distribution and consumption of adult content in a virtual space.[235] This complicated the three-part *Miller* test's "community standards" component—the determination of what constituted a "community" and that increasingly amorphous community's subsequent identification of obscenity became much more difficult.[236] Regardless of these Digital/Virtual Era "community" complications, no changes have been made to the legal guidelines for obscenity developed during the Reel Era and set forth by the *Miller* test.[237] Moreover, as previously discussed, aside from adjust-

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consistencies because contemporary community standards vary from community to community. *Id.* at 109. Although the inconsistencies from the community standard can be managed when applied to traditional works, when applied to the Internet, the community standard is inadequate. *Id.* at 111. For example, when applying the community standard to the Internet, what is the relevant community? *Id.* Should a local community or a virtual community judge obscenity? *Id.* Because the *Miller* standard has not yet adapted to advances in technology, the Internet causes "unique problems for First Amendment jurisprudence regarding its definition and regulation of obscene material." *Id.* at 112–13.

235. *See Danni's Hard Drive to Adult Content Success*, CNN (Oct. 21, 2000), http://articles.cnn.com/2000-10-21/tech/index.ashe_cover.ashe_1_adult-sites-adult-content-danni-ashe?_s=PM:TECH (reporting on Danni Ashe, a former strip club dancer who in 1995 successfully launched one of the most popular adult websites which receives its revenues almost exclusively from subscriptions and has become a business model not only for adult content, but also for the music industry). In addition, Ashe's company has developed its own streaming technology, which makes plug-ins, or additional program downloads obsolete. *Id.* This streaming method, along with the credit card scrubbing technologies and new and improved methods for hosting, processing, and customer service developed by Ashe's team, are now marketed to other companies. *Interview: Danni Ashe*, PBS, http://www.pbs.org/wgbh/pages/frontline/shows/porn/interviews/ashe.html (last visited Oct. 25, 2012).

236. *See, e.g.*, Frederick B. Lim, *Obscenity and Cyberspace: Community Standards in an On-Line World*, 20 COLUM.-VLA J.L. & ARTS 291, 315 (1996) (emphasizing the practical difficulties of determining the relevant community standards where material is distributed widely, across an entire state or even nation-wide). *See also* Confessore, *supra* note 214 (internal quotations omitted) (quoting an attorney for the ACLU as saying, "[o]nce you create the website, anybody—whether they are in Memphis, Tenn., or Las Vegas, Nev.—can access your speech . . . . You could be subjected to the community standard of the least tolerant community, simply by putting your speech on the Web.").

237. *See, e.g.*, United States v. Extreme Assoc., Criminal No. 03-0203, 2009 WL 113767, at *3, *4 (W.D. Pa. Jan. 15, 2009) (rejecting defendants' argument that content published online requires a new community standard, holding that under Supreme Court precedent the community standard of the jury pool shall be determinative).

ments to the age minimum,[238] efforts to further extend "child pornography" restrictions have failed.[239]

Two notable clarifications regarding obscenity occurred during the Digital/Virtual Era however. First, the Supreme Court held in *Denver Area Educ. Telecomm. Consortium v. FCC*[240] that cable operators should not be allowed to prohibit programming on public access television channels which they perceive as patently offensive.[241] Second, in *Reno v. ACLU*,[242] the Court limited Internet-related "anti-indecency" provisions included in the Communications Decency Act of 1996 (CDA) as overbroad and vague.[243] Put simply, expression that is indecent, but not ob-

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238. *See* United States v. X-Citement Video, Inc., 513 U.S. 64, 78–79 (1994) (rejecting respondents' claim that a statute which raised the age of majority from sixteen to eighteen was unconstitutional).

239. *See, e.g.*, Ashcroft v. Free Speech Coal., 535 U.S. 234, 241–42, 258 (2002) (holding that prohibitions against portrayals that merely appear to show a minor performing sexual acts—so-called "virtual child pornography"—or material that is advertised with the promise to show a minor having sex are overbroad and unconstitutional).

240. 518 U.S. 727 (1996).

241. *Id.* at 766 (involving constitutional challenges to three statutory provisions under the Cable Television Consumer Protection and Completion Act of 1992 (Act), designed to "regulate the broadcasting of 'patently offensive' sex-related material on cable television."). In this case, the court found a provision allowing cable operators to block programming which they perceive as "patently offensive" from public access channels violative of the First Amendment. *Id.* Other than leased cable channels, which are reserved for commercial use, public access channels are generally set aside by cable system operators for public, educational, or governmental programming. *Id.* at 734. One of the Act's provisions did enable a cable operator to prohibit transmission of sexually explicit material on public access channels. *Id.* at 735. Public access channels, however, are already extensively regulated and supervised. *Id.* at 761. Therefore, a "cable operator's veto" would not only be redundant, but also prone to overreaching by blocking programming that may only border on the patently offensive, such as sex or health education, or artistic experiments. *Id.* at 763.

242. 521 U.S. 844 (1997).

243. *Id.* at 849 (examining the constitutionality of parts of the Communications Decency Act "enacted to protect minors from 'indecent' and 'patently offensive' communications on the Internet."). The court in *Reno v. ACLU* found that, in its attempt to prevent minors from potentially harmful online content, the CDA inevitably suppresses the First Amendment rights of adults. *Id.* at 874. The first of the two provisions in question "prohibit[ed] the knowing transmission of obscene or indecent messages" to anyone younger than eighteen. *Id.* at 859. "The second provision[,] . . . prohibit[ed] the knowing sending or displaying of patently offensive messages in a manner that is available to a person under [eighteen] years of age." *Id.* This prohibition included depictions or descriptions of sexual organs. *Id.* at 860. The Act provided two affirmative defenses for cases in which the defendant had taken reasonably effective measures to keep prohibited material from minors, or for providers who required proof of age. *Id.* at 860–61. However, the Court took issue with the feasibility of age verification tools in the noncommercial context. *Id.* at 881. More importantly, the Act was overly broad in that it covered all types of speech, commercial and private. *Id.* at 877. Furthermore, the provisions lacked clear definitions of what

scene, is protected under the First Amendment.[244] Although both these decisions endeavor to clarify obscenity in specific instances, it is clear that obscenity has become increasingly amorphous and complex in the Digital/Virtual Era, and much of the ambiguity surrounding obscenity centers on language and notions of community.[245] Various manifestations of the complexity of obscenity in the Digital/Virtual Era are illustrated by the following cases involving adult content producers Adam Glasser of Seymore, Inc.,[246] and Rob Zicari and Janet Romano of Extreme Associates.[247]

Adam Glasser is an adult film producer known also by the pseudonym "Seymore Butts."[248] In 1998, Glasser's company, Seymore Inc., produced a film entitled *Tampa Tushy Fest, Part 1*.[249] In the film's final scene, two women performers engage in a sex depiction that involves vaginal fisting, anal fisting, double vaginal fisting, and double penetrative (anal and vaginal) fisting.[250] Apparently aware of the potentially controversial nature of this film, Glasser cut and released two versions of *Tampa Tushy Fest*, one with the final scene included and one without.[251] Not surprisingly, Glasser immediately began receiving criticism from industry insiders believing the extreme scene would draw negative attention to the industry, putting everyone at risk for obscenity investigations.[252] AVN even re-

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should be regarded as indecent or patently offensive, thus inadvertently including a wide array of educational or artistic material. *Id.*

244. *Id.* at 874.

245. *See generally* Julie Hilden, *Should the Obscenity Standard for Internet Speech Be National, or Local?*, FINDLAW (Mar. 2, 2010), http://writ.news.findlaw.com/hilden/20100302.html (discussing the difficulties of determining which community standard for obscenity is appropriate in the context of Internet speech). The argument that Internet speech does not fit into the confines of conventional community standards is not new. *Id.* However, even under a national standard many problems remain to be solved. *Id.* Whose views should a national standard for obscenity reflect: those of the majority or those of the average person living in the United States? *Id.* In general, it is unlikely that a national standard could be fairly applied because it would likely be cast in conservative federal districts with little chance to truly reflect the "average" U.S. obscenity standard. *Id.*

246. *A Case to Watch: People v. Adam Glasser*, PBS, http://www.pbs.org/wgbh/pages/frontline/shows/porn/prosecuting/casetowatch.html (last visited Oct. 25, 2012).

247. United States v. Extreme Assoc., 352 F.Supp.2d 578, 582–84 (W.D. Pa. 2005).

248. *A Case to Watch*, *supra* note 246.

249. *Id.*

250. *See* Mark Kernes, *Tampa Tushy Fest, Part 1*, AVN (June 1, 2002), http://www.avn.com/movies/16749.html (reviewing *Tampa Tushy Fest, Part 1*).

251. Susannah Breslin, *Extreme Porn Crackdown*, SALON (Aug. 13, 2001), http://www.salon.com/2001/07/12/seymore/.

252. *Id.*

fused to review the film due to concerns over the fisting scene.[253] Regardless, the questionable scene won the AVN award for "Best All-Girl Sex Scene" and "Best Gonzo" in 2000.[254]

On March 16, 2001, Glasser and his mother Lila, then employed as the secretary of Seymore, Inc., were charged with two counts of obscenity by the State of California.[255] According to criminal defense attorney and ACLU Southern California Board of Directors member Jeffrey Douglas, the charges against *Tampa Tushy Fest* were potential indicators of an emerging campaign to "crackdown" on porn production.[256] Douglas maintained that, through targeting more extreme content, prosecutors and LAPD vice hoped to develop an obscenity precedent that would allow them to target more prolific and visible adult production companies.[257] He speculated that this witch-hunt would start with Glasser; however, all charges against Glasser, his mother, and Seymore, Inc. were dismissed in March of 2002, rendering *Tampa Tushy Fest* essentially "bust-proof" in California and on the Internet.[258]

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253. *See* Kernes, *Tampa Tushy Fest*, *supra* note 250 (explaining that AVN originally did not review *Tampa Tushy Fest, Part 1* due to the controversy surrounding the fisting scene, and going on to finally review the film three years after the release).

254. Breslin, *supra* note 251; *2000 Winners*, AVN AWARDS, http://avnawards.avn.com/past-shows/past-winners/2000/ (last visited Oct. 17, 2012).

255. *See id.* (listing the charges as "distribution of obscene material" and "advertising of obscene matter for sale"). In an interview with PBS, Deborah Sanchez, the Deputy City Attorney in Los Angeles, explained the guidelines for prosecuting acts considered to be obscene. *See Interview: Deborah Sanchez*, PBS (July 2001), http://www.pbs.org/wgbh/pages/frontline/shows/porn/interviews/sanchez.html (referring to the types of conducts which the City Attorney's office are evaluating for obscenity violations). Sanchez has an acronym for these types of acts and whenever present in a video she prosecutes to the fullest. *Id.* The acronym is "CURBFHP," the "C" stands for children involved, "U" for urination or defecation, "R" is for rape scenes, "B" stands for bestiality, "F" is for fisting or foot insertion, "H" is for homicide or dismemberment in conjunction with the sex act, and "P" is for sever infliction of pain. *Id.*

256. Breslin, *supra* note 251.

257. *Id.*; *see Interview: Roger Diamond*, PBS (July 2001) (looking to Diamond's commentary on police going after certain types of defendants).

258. Kernes, *Tampa Tushy Fest*, *supra* note 250. *See A Case to Watch*, *supra* note 246 (making reference to the plea agreement reached by Glasser and the L.A. City Attorney's Office, which included, a public nuisance change, a fine of $1000, and an agreement that Glasser is free to sell the unedited version of *Tampa Tushy-Fest, Part 1* in California without fear of future obscenity charges). According to Adult Video News, the L.A. City Attorney was willing to drop the obscenity charges after Glasser asserted that "fisting" is pervasive amongst the heterosexual, gay, and lesbian communities. Ed Hynes, *A View from Riverside Drive*, MORALITY IN MEDIA (Oct. 2002), http://66.210.33.157/mim/full_article.php?article_no=339. Glasser went on to say that the dismissal of the charges was a "small step for the adult industry, but [was] a large step for freedom of speech." *Id.*

On February 7, 2002, PBS aired a *Frontline* investigation entitled "American Porn," which took an in-depth look at some dimensions of the U.S. adult content production industry and at some U.S.-based amateur porn producers.[259] A small production company, Extreme Associates, and its owner, operator Rob Zicari (also known as "Rob Black") and Janet Romano (also known as "Lizzie Borden") were featured prominently.[260] Romano was shown filming some non-sexually-explicit scenes for the Extreme Associates' film *Forced Entry*.[261] The scenes were so disturbing to the PBS film crew that they filmed themselves leaving in hasty disgust.[262] Though it would later be revealed that Extreme Associates had already been under obscenity investigation for a minimum of one year, presumably because of the footage in "American Porn," the U.S. Postal Inspection Service began an investigation of Extreme Associates in September 2002.[263] In August 2003, a federal grand jury indicted Zicari and Romano on ten obscenity-related counts against five of Extreme Associates' films, including *Forced Entry*.[264] The charges presented in *United States v. Extreme Associates*[265] were dismissed on January 20, 2005,[266] but the decision was then reversed on appeal on December 8, 2005.[267] In its reversal, the Third Circuit held that the District Court's opinion failed to take into account an entire line of Supreme Court decisions upholding regulation of obscene material.[268] Although Zicari and Romano eventually pled guilty to the charges, the oscillations in the Extreme Associates-related legal proceedings illustrate difficulties in determining what constitutes obscenity.

Both the *Glasser* and *Extreme Associates* indictments illustrate the complexity of obscenity in the Digital/Virtual Era.[269] In Glasser's case,

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259. *Frontline: American Porn* (PBS television broadcast Feb. 7, 2002), *available at* http://www.pbs.org/wgbh/pages/frontline/video/flv/generic.html?s=frol02p341&continuous=1.

260. *Id.*

261. FORCED ENTRY (Extreme Associates 2002).

262. *Frontline: American Porn*, *supra* note 259; BRENDA COSSMAN, SEXUAL CITIZENS: THE LEGAL AND CULTURAL REGULATION OF SEX AND BELONGING 56 (2007).

263. Jake Tapper, *Court Deals Blow to U.S. Anti-Porn Campaign*, ABC NEWS, Jan. 24, 2005, http://abcnews.go.com/Nightline/Business/Story?id=433956#.UHtL678ao_U.

264. News Release, Mary Beth Buchanan, U.S. Attorney, Dep't of Justice (Aug. 7, 2003), www.justice.gov/criminal/ceos/pressreleases/downloads/WDPA%20Zicari%20indict%20PR_080703.pdf. *See* Tapper, *supra* note 263 (describing the indictments against Zicari and Romano, who faced a fine of $2.5 million and up to 50 years in prison).

265. 352 F.Supp.2d 578 (W.D. Pa. 2005).

266. United States v. Extreme Assoc., 352 F.Supp.2d 578 (W.D. Pa. 2005).

267. United States v. Extreme Assoc., 431 F.3d 150, 162 (3d Cir. 2005).

268. *Id.* at 162.

269. *See* Tapper, *supra* note 263 (explaining the viewpoint that obscenity laws are in conflict with the right to privately view content like Extreme Associate's films over the

the relevance of reshaped and redefined "community standards" is significant.[270] Although the sexual behaviors depicted in the final scene of *Tampa Tushy Fest, Part 1* are uncommon in U.S. adult content production, it was shown that a (virtual) community was seeking this material.[271] People were buying this film.[272] Consequently, it was quickly determined that the government had no interest in prosecuting the material within *Tampa Tushy Fest.*[273]

Glasser's case was far more straightforward than the Zicari/Romano case.[274] The Extreme Associates films in question showed graphic depictions of extreme sex behavior couched in U.S. cultural hot buttons and taboos including religion, incest, terrorism, rape, murder, violence against women, and the sexual abuse of underage persons.[275] This combination—extreme sex coupled with cultural taboos—placed Extreme Associates' content in a different category than *Tampa Tushy Fest.* In the end, however, both cases point to the complexity of obscenity under existing law in the Digital/Virtual Era.[276] These cases also point to the emergence of an industry protective practice—the informal production code colloquially known as the Cambria List.[277]

Internet); *see also* Breslin, *supra* note 251 (indicating that Glasser's *Tampa Tushy Fest, Part 1* is mainstream in terms of the Internet and adult material available on the web).

270. *See* Breslin, *supra* note 251 (referencing "community standards" as a fairly arbitrary and difficult-to-define standard, particularly when applied to Glasser's *Tampa Tushy Fest*).

271. *See id.* (referencing "sexpert" Tristan Taormino's declaration that fisting has become mainstream).

272. *See id.* (quoting Glasser: "the number of requests we get for that movie are great.").

273. *A Case to Watch*, *supra* note 246.

274. *Compare id.* (noting that Glasser's case never went to trial, instead Glasser reached a settlement with prosecutors), *with* Tapper, *supra* note 263 (distinguishing Glasser's case from Zicari and Romano's because the *Extreme Associates* case actually went to trial, which the Bush administration recognized as "pivotal").

275. *See Frontline: American Porn*, *supra* note 259 (describing two movies in which scenes depict rapes, killings, women being spit on, and adult women dressing and acting like young girls in hard-core scenes).

276. *See* United States v. Extreme Assoc., Criminal No. 03-0203, 2009 WL 113767, at *2, *3 (W.D. Pa. Jan. 15, 2009) (arguing that an expansion of existing law was needed "due to the advent of the Internet"); Tapper, *supra* note 263 (declaring aspects of the government's obscenity laws unconstitutional); *see also* Breslin, *supra* note 251 ("When it comes to the LAPD and porn, the LAPD wants the nastiest, dirtiest, most extreme porn around.").

277. *See* Mark Cromer, *Porn Jitters: Maybe W. Can't Spell Pornography*, LA WEEKLY, Feb. 21, 2001 http://www.laweekly.com/2001-03-01/news/porn-jitters/ ("Dubbed the 'Cambria List' after the lawyer who crafted it, First Amendment attorney Paul J. Cambria, the guidelines effectively put to an end a host of sexual acts that range from the bizarre to the basic.").

B. *The Adult Industry's (Informal) Production Code—The Cambria List*

First amendment attorney Paul J. Cambria has argued several cases before the U.S. Supreme Court and has represented many controversial public figures including musicians DMX, and Marilyn Manson and Hustler magnate and civil rights activist Larry Flynt.[278] According to Larry Flynt, Cambria is "probably the best obscenity lawyer in America."[279] As previously discussed, the adult industry was under intense scrutiny during the early 2000s by the George W. Bush administration.[280] Proposed unconstitutional acts and obscenity indictments put members of the industry and their legal counsel on high alert, particularly those with high occupational stakes in the business.[281]

During this period of high anxiety, industry leaders from VCA, Vivid Entertainment, Hustler, and Video Team met with Paul Cambria to devise tactics for dealing with the conservative political and social climate.[282] One tactic was the generation of a list of production and

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278. *See Attorneys*, LIPSITZ GREEN SCIME CAMBRIA L.L.P., http://www.lipsitzgreen.com/attorneys-12.html (last visited Oct. 25, 2012) (detailing Paul Cambria's credentials and experience). *See, e.g.*, Calvert & Richards, *Adult Entertainment and the First Amendment*, *supra* note 282, 147 (2004) (noting that Cambria serves as Larry Flynt's general council); Salvatore Arena, *Shock Rocker is Sued For $24M*, N.Y. DAILY NEWS (Jan. 6, 1999, 12:00 AM), http://www.nydailynews.com/archives/news/shock-rocker-sued-24m-article-1.838248 (citing Cambria as Marilyn Manson's attorney); Corey Moss, *DMX Pleads Guilty To Reckless Assault, Pays $1,000 Fine*, MTV (July 26, 2001, 4:48 PM), http://www.mtv.com/news/articles/1445426/dmx-pleads-guilty-pays-fine.jhtml (citing Cambria as DMX's attorney).

279. Clay Calvert & Robert Richards, *Larry Flynt Uncensored: A Dialogue with the Most Controversial Figure in First Amendment Jurisprudence*, 9 COMMLAW CONSPECTUS 159, 168-69 (2001). *See also* Clay Calvert & Robert D. Richards, *Adult Entertainment and the First Amendment: A Dialogue and Analysis with the Industry's Leading Litigator & Appellate Advocate*, 6 VAND. J. ENT. L. & PRAC. 147, 147 (2004) (quoting the Larry Flynt article and interviewing Cambria for his views on the pornography industry).

280. *See* Calvert & Richards, *The Free Speech Coalition & Adult Entertainment*, *supra* note 225, at 283 (explaining that former Attorney General John Ashcroft intended to go after the pornography industry when he took office in 2001, but was held back by the events of September 11, 2001, and reinvigorated his efforts to investigate and prosecute federal obscenity violations in 2003).

281. *See* Cromer, *supra* note 277 (discussing the general fear felt throughout the pornography industry following the inauguration of George W. Bush as president); *see also* Tristan Taormino, *Panic in Pornville*, VILLAGE VOICE, Feb. 13, 2001, http://www.villagevoice.com/2001-02-13/columns/panic-in-pornville/ (noting that industry began to panic about the increased possibility of prosecution under the Bush administration).

282. Clay Calvert & Robert D. Richards, *Adult Entertainment and the First Amendment: A Dialogue and Analysis with the Industry's Leading Litigator & Appellate Advocate*, 6 VAND. J. ENT. L. & PRAC. 147, 163 (2004); Tristan Taormino, *Panic in Pornville*, VILLAGE VOICE, Feb. 13, 2001, http://www.villagevoice.com/2001-02-13/columns/panic-in-pornville/.

marketing guidelines they called the "Box Cover and Movie Production Guidelines."[283] Based on Cambria's experience and industry leaders' input, the list itemizes the most commonly used depictions in obscenity indictments.[284] Made public in January of 2001, this informal production code became colloquially known throughout the adult industry as the "Cambria List."[285] Among other acts, the Cambria List suggests producers avoid sex depictions involving "fisting," "bi-sex," "wax dripping," "male/male penetration," "transsexuals," "incest topics," "forced sex" and rape, and depictions involving Black men and White women.[286]

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283. Calvert & Richards, *Adult Entertainment and the First Amendment*, *supra* note 282.

284. *See id.* at 164. In the interview between the author and Cambria, Cambria points out that each item on the list was included not only at his suggestion, but it was augmented by industry leaders after he provided a list of the most litigated depictions. *Id.* Cambria says that at least one industry leader added a few depictions that he personally did not like to the list and that after the list was created some used it to justify more controls on what was being produced. *Id.*

285. *Id.* at 163; Cromer, *supra* note 277.

286. *The Cambria List*, PBS (Jan. 18, 2001), http://www.pbs.org/wgbh/pages/frontline/shows/porn/prosecuting/cambria.html. The full lists contains the following:

No shots with appearance of pain or degradation
No facials (bodyshots are OK if shot is not nasty)
No bukakke
No spitting or saliva mouth to mouth
No food used as sex object
No peeing unless in a natural setting, e.g., field, roadside
No coffins
No blindfolds
No wax dripping
No two dicks in/near one mouth
No shot of stretching pussy
No fisting
No squirting
No bondage-type toys or gear unless very light
No girls sharing same dildo (in mouth or pussy)
Toys are OK if shot is not nasty
No hands from 2 different people fingering same girl
No male/male penetration
No transsexuals
No bi-sex
No degrading dialogue, e.g., "Suck this cock, bitch" while slapping her face with a penis
No menstruation topics
No incest topics
No forced sex, rape themes, etc.
No black men-white women themes

Id.

Moreover, the Cambria List encourages producers to avoid using still photos that "depict any unhappiness or pain."[287]

On the basis of the Cambria List alone, it is obvious that obscenity is a subjective attribute, made problematic by its close connection to deep-seated ideas of racism, sexual normativity, and heterosexism in United States' culture.[288] Ostensibly, one way for porn producers to avoid legal trouble is to avoid sex depictions involving historically marginalized groups, such as queer persons or persons of color, interracial sex couplings, or depictions of sexual abnormativity.[289] Although the Cambria List was greeted with varying degrees of gratitude and skepticism,[290] it should be noted that the charges previously discussed in both *Glasser* and *United States v. Extreme Associates* involved depictions included in the Cambria List.[291]

During the Digital/Virtual Era, obscenity became even more difficult to identify, specifically because of preexisting legal standards and developing technology.[292] One stipulation of the three-pronged *Miller* test tasks "the average person, applying contemporary community standards" with identifying obscenity.[293] What constitutes "average" and "commu-

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287. *Frontline: American Porn*, *supra* note 259. The list of depictions to omit is preceded by an admonition to check facial expressions before selecting a "crome" and not use "not use any shots that depict any unhappiness or pain." *Id.*

288. *See* Calvert & Richards, *Adult Entertainment and the First Amendment*, *supra* note 282, at 163–64 (describing how the Cambria List came about, what it is and the reactions of Cambria himself, along with others in the adult film industry to its publicity).

289. *See id.* (detailing the origins and purpose of the Cambria List, which can be used to eliminate potential depictions that would draw the ire of officials).

290. Cromer, *supra* note 277.

291. *The Cambria List*, *supra* note 286. *See* United States v. Extreme Associates, Inc., 352 F.Supp.2d 578, 582–84 (W.D. Pa. 2005) (listing the process of finding and viewing the video clips from the website that led to the indictment); *A Case to Watch*, *supra* note 246.

292. *See* Miller v. California, 413 U.S. 15, 24 (1973) (outlining the basic guidelines used by a trier of fact to determine obscenity). Chief Justice Burger explained the three prongs of the *Miller* test as:

> whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest, whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 15; *see* Calvert & Richards, *Adult Entertainment and the First Amendment*, *supra* note 282, at 163–64 (describing how Defense Attorney Paul J. Cambria decided upon the Cambria list in part to protect adult film distributors in the early 2000s); Cromer, *supra* note 277, at 1–2 (describing how the internet has affected the U.S. adult content production industry).

293. *See Miller*, 413 U.S. at 15 (quoting the first prong of the basic guidelines for the trier of fact to use to define obscene materials, outlined by Chief Justice Burger in the landmark *Miller* decision).

nity," however, is completely amorphous in an online world. In the online world, a handful of geographically fragmented consumers may constitute a (virtual) community; and a (virtual) community of consumers may show their support of a product by purchasing it. On these grounds, technology complicated *Miller*'s definition of obscenity significantly. Examples such as the charges in *Glasser* and the *United States v. Extreme Associates* case illustrate these complications and ambiguities.[294]

VI. Discussion And Conclusion

In this article, I have outlined relevant legal proceedings occurring during three eras of U.S. adult content production and distribution in order to show pornography's evolution from clandestine enterprise to legal, protected free speech. This evolution parallels the development of an adult content production industry in California.[295] And although two recent obscenity-related adult content production, sales, and distribution convictions have occurred, these cases were related to exceptional material that violated the Cambria List guidelines.[296] The vast majority of adult content produced since the *Miller* decision is not obscene; consequently, in this respect, the adult content production industry is a legal legitimate space working to meet consumer demands with a legal legitimate product.[297]

Further, I have engaged a small sampling of anti-pornography campaigns occurring in various dimensions of wider culture. It is important to note that the examples discussed in this essay are only the tip of the iceberg—instances of anti-pornography rhetoric, organizing, and activism occurring in wider U.S. culture are almost endless, as are instances of

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294. United States v. Extreme Assoc., Criminal No. 03-0203, 2009 WL 113767, at *1 (W.D. Pa. Jan. 15, 2009); *A Case to Watch*, *supra* note 246.

295. *See Prevention and Control of Sexually Transmitted Infections and HIV among Performers in the Adult Film Industry*, American Pub. Health Ass'n, Nov. 9, 2010, http://www.apha.org/advocacy/policy/policysearch/default.htm?id=1396 (noting California's role in the adult film industry); *see also* State v. Theriault, 960 A.2d 687, 692 (N.H. 2008) (noting that as of 2008, adult content production is also legal in the state of New Hampshire). It is worth noting though that, in spite of existing laws, professional and amateur adult content production does also occur outside California and New Hampshire. *Id.*

296. *See* United States v. Little, 365 F. App'x. 159, 161 (11th Cir. 2010) *and Federal Jury Finds Ira Isaacs Guilty in Los Angeles Adult Obscenity Case*, U.S. Dep't of Justice (Apr. 27, 2012), http://www.justice.gov/opa/pr/2012/April/12-crm-554.html (noting recent convictions). *See also* Mark Kernes, *Stagliano Obscenity Trial: The Post-Game Wrap-Up*, AVN (Aug. 5, 2010, 5:39 PM), http://business.avn.com/articles/legal/Stagliano-Obscenity-Trial-The-Post-Game-Wrap-Up-406388.html (noting recent acquittal).

297. *See Adult Material*, Electronic Frontier Found., https://www.eff.org/issues/bloggers/legal/adult (last visited Oct. 25, 2012) (noting First Amendment protection for legal online adult content).

discrimination against persons currently or formerly involved in adult content production.[298] What is more, one could argue that the specific cases discussed in this essay are themselves just additional indicators of cultural discord related to adult content and adult content production. The question then remains—why? Why, in spite of its legal and protected status, are adult content and adult content production still stigmatizing and polarizing dimensions of U.S. culture?[299]

Relevant case law regarding obscenity engaged in conjunction with historical sociological considerations of cultural attitudes about adult entertainment point to legal findings that outpace sociocultural evolutions.

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298. *See* C.S. Magor, *Johnny Anglais: Teacher Moonlighted as Stripper, Porn Star*, WE INTERRUPT, http://weinterrupt.com/2010/07/johnny-anglais-teacher-moonlighted-as-stripper-porn-star/ (last visited Oct. 25, 2012) (describing a high school teacher who was fired after it was discovered he was earning extra money as a stripper and porn performer); Megan Hoye, *Teacher Fired for Porn Star Past*, SFGATE (Mar. 9, 2011, 9:47 AM), http://blog.sfgate.com/hottopics/2011/03/09/teacher-fired-for-porn-star-past/ (identifying a case of a teacher being fired for performing in adult films two decades ago); Tom Hymes, *Oxnard Fires Stacie Halas to Avoid 'Disruption'*, AVN (Apr. 19, 2012, 1:45 PM), http://business.avn.com/articles/legal/Oxnard-Fires-Stacie-Halas-to-Avoid-Disruption-473552.html (naming another instance of an adult performer being fired from her job as a teacher); Mark Kernes, *Compton Horror: Sasha Grey—Gasp!—Reads to Kids!*, AVN (Nov. 15, 2011, 4:18 PM), http://business.avn.com/articles/video/Compton-Horror-Sasha-Grey-Gasp-Reads-to-Kids-UPDATED-454605.html (addressing parental outrage that adult performer Sasha Grey read to children in a classroom setting); Louis Peitzman, *Teacher Fired Over Gay Porn Career Has Been Reinstated*, GAWKER (Mar. 10, 2012, 2:52 PM), http://gawker.com/5892203/teacher-fired-over-gay-porn-career-has-been-reinstated (reporting on a rare instance of a gay adult performer being reinstated to his position as a middle school substitute teacher); *Chandella Powell, Fired from the UFC for Secret Past Life as Mariah Ashton*, MMAMADMAN (Feb. 18, 2012, 5:28 AM), http://www.mmamadman.com/2012/02/chandella-powell-released-from-ufc-for.html (touching on the highly publicized instance of a UFC girl being fired for her prior career as a suggestive model); *Harmony Rose Stirs Controversy as Volunteer EMT*, AVN (Jul. 13, 2012, 1:41 PM), http://business.avn.com/articles/video/Harmony-Rose-Stirs-Controversy-as-Volunteer-EMT-481834.html (discussing the controversy surrounding an adult performer's participation as a volunteer EMT); *University College Dublin Revokes Tanya Tate Speaking Offer*, AVN (Aug. 9, 2012, 12:00 PM), http://business.avn.com/company-news/University-College-Dublin-Revokes-Tanya-Tate-Speaking-Offer-485032.html (pointing out that a Dublin college rescinded its offer to an adult star to come speak, due to the taboo nature of her career).

299. *See Pornography and Censorship*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Oct. 1, 2012), http://plato.stanford.edu/entries/pornography-censorship/ (noting the conversation about censorship of the adult industry is still very alive); *Pornography*, ENCYCLOPEDIA69.COM, *available at* http://www.encyclopedia69.com/eng/d/pornography/pornography.htm (last visited Oct. 25, 2012) (explaining the continued controversy surrounding adult content production). See also Danielle N. Boaz, *Dividing Stereotype and Religion: The Legal Implications of the Ambiguous References to VooDoo in U.S. Court Proceedings*, 14 SCHOLAR 251, 268 (2011) (pointing out that the movie and television industries also reinforced stereotypes and contributed to the stigmatization of VooDoo in the United States.)

Wider U.S. culture continues to struggle with pornography;[300] however, in terms of obscenity, U.S. law does not. Legal proceedings cleared the way for adult content production and industry development, not legislation or voter sentiment.[301] In fact, although an assessment of every U.S. person's stance on pornography cannot be determined, the jurisprudence discussed in this essay seemed to occur in spite of widely varied and hotly contested ideologies about adult content production.

Members of the adult entertainment community were only able to establish legal footholds within the context of greater U.S. culture by fighting back when attacked, demanding First and Fourth Amendment rights.[302] And, in spite of continued stigma and marginalization, the adult entertainment industry as a whole acts as a protective sentinel for every individual's right to free expression. In terms of adult content producers' civil rights, however, law has moved much more quickly than culture. Though considerations of continued discrimination against pornography and adult content production are extremely troubling, in a society that continues to marginalize queer persons and the socio-economically disadvantaged (among so many others), marginalization is not exactly surprising.

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300. Consider Measure B, an ordinance passed in LA County on November 6, 2012. In spite of opposition from the adult industry and an effective industry-mandated STI testing, mitigation, and monitoring system, LA County voters passed an ordinance that requires adult performers to wear barrier protection (condoms, dental dams, etc) during sex performances and producers to obtain an additional public health permit before shooting. Claire Clough, *L.A. County Voters Approve Measure Requiring Condoms in Adult Films*, THE BEVERLY HILLS PATCH, Nov. 25, 2012, http://beverlyhills.patch.com/articles/l-a-county-voters-approve-measure-requiring-condoms-on-adult-film-sets. Porn sets are also to be monitored by County Public Health Officials. *Id.* This ordinance passed 56.96% "yes" to 43.04% "no" and speaks to the general population's continued ambivalence about pornography. *Id.*

301. *See* Miller v. California, 413 U.S. 15, 23–24 (1973) (liberalizing obscenity test by removing 'redeeming social value' language).

302. *See id.* (outlining the *Miller* test and making a point of removing 'redeeming social value' language); A Book Named 'John Cleland's' Memoirs of a Woman of Pleasure v. Massachusetts, 383 U.S. 413, 417, 419 (1966) (overturning a conviction and clarifying the social value criterion of the three-pronged test for obscenity); Marcus v. Search Warrants of Prop., 367 U.S. 717, 731, 733 (1961) (holding that a Missouri procedure to seize obscene material "lacked the safeguards which due process demands."); Roth v. United States, 354 U.S. 476, 489–90 (1957) (liberalizing the definition of 'obscenity').